DEPARTMENT OF LABOR AND INDUSTRY

CHAPTER 16

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Sub-Chapter 1

An Introductory Statement

24.16.101 GENERAL STATEMENT (1) The Montana Minimum Wage and Overtime Compensation Act is a Montana statute of general application which establishes minimum wage and overtime pay that apply as provided in the law. All employees are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the law's provisions in this regard unless relieved therefrom by some exemption in the law.

(2) These interpretations and regulations contain the construction of the law which the commissioner believes to be correct and which will guide him in the performance of his duties under the law, unless and until he is otherwise directed by authoritative decisions of the courts or he concludes upon re-examination of a regulation or interpretation that it is incorrect. The interpretations contained herein may be modified, amended, rescinded, or determined by judicial authority to be incorrect. (History: Sec. 39-3-402 MCA; IMP, Sec. 39-3-401 MCA; NEW, 12/31/72.)

24.16.102 GENERAL TERMS USED (1) "Administrator" means the administrator of the employment relations division, Montana department of labor and industry. The commissioner of labor and industry has delegated to the administrator the functions vested in him.

(2) "Division" means the employment relations division of the Montana department of labor and industry. (History: Sec. 39-3-403 MCA; IMP, Sec. 39-3-401 et seq. MCA; Eff. 12/31/72.)

Rules 24.16.103 through 24.16.110 reserved

24.16.111 STATUS OF CERTAIN PERSONAL ASSISTANTS FOR THE PURPOSE OF WAGE AND HOUR LAWS (1) For the purposes of wage and hour laws, a person with a disability who receives services of a personal assistant or an immediately involved representative of the disabled person, such as a parent or guardian, is not the employer of the personal assistant despite the exercise of control over the selection, management and supervision of the personal assistant if:

(a) the personal assistant is providing services to the disabled person pursuant to 53-6-145, MCA, and rules adopted by the department of public health and human services implementing that statute; and

(b) the personal assistant is the employee of another person or entity that has the right to exercise an employer's control over the personal assistant, including the right to discipline and terminate employment. (History: Sec. 53-6-145 MCA; IMP, Sec. 53-6-145 MCA; NEW, 1995 MAR p. 2145, Eff. 10/13/95.)

Sub-Chapter 2

Executive, Administrative and Professional,
Defining the Terms

24.16.201 EXECUTIVE (1) The term "employee employed in a bona fide executive * * * capacity" in Section 39-3-406(1)(j) MCA of the Montana Minimum Wage and Overtime Compensation Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in subsections (a) through (d) of this section:

Provided, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $150 per week, exclusive of board, lodging, or other facilities:

Provided, that an employee who is compensated on a salary basis at a rate of not less than $200 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which he is employed or a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section. This subsection (1) (f) shall not apply to employees whose salary or wages are fixed by legislative action. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406(1)(j); EMERG, NEW, Eff. 5/6/73; AMD, Eff. 10/5/73.)

24.16.202 ADMINISTRATIVE (1) The term "employee employed in a bona fide * * * administrative * * * capacity" in Section 39-3-406(1)(j) MCA of the Montana Minimum Wage and Overtime Compensation Act.

shall mean any employee whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers,

(2) Who customarily and regularly exercises discretion and independent judgment; and

(3) (a) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(b) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(c) Who executes under only general supervision special assignments and tasks;

(4) Who does not devote more than 20 percent or, in the case of an employee of a retail or service establishment, who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraph (1) of this section; and

(5) Who is compensated for his services on a salary or fee basis at a rate of not less than $150 per week, exclusive of board, lodging, or other facilities, or

Provided, that an employee who is compensated on a salary or fee basis at a rate of not less than $200 per week, exclusive of board, lodging, or other facilities and whose primary duty consists of the performance of work described in paragraph (1) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section. This subsection (5) shall not apply to employees whose salary or wages are fixed by legislative action. (History: Sec. 39-4-403, MCA; IMP, Sec. 39-4-406(1)(j), MCA; EMERG, NEW, Eff. 5/6/73; AMD, Eff. 10/5/73.)

24.16.203 PROFESSIONAL (1) The term "employee employed in a bona fide * * * professional capacity" in Section 39-3-406(1)(j) MCA of the Montana Minimum Wage Law shall mean any employee:

(a) Whose primary duty consists of the performance of:

(i) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), imagination, or talent of the employee, or

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $150 per week, exclusive of board, lodging, or other facilities:

Provided, that this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, and

Provided further, that an employee who is compensated on a salary or fee basis at a rate of not less than $200 per week, exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (1) of this section which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section. This subsection (1) (e) shall not apply to employees whose salary or wages are fixed by legislative action. (History: Sec. 39-1-403, MCA; IMP, Sec. 39-4-406(1)(j), MCA;EMERG, NEW, Eff. 8/6/73; AMD, Eff. 10/5/73.)

24.16.204 EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE CAPACITY (1) Section 39-4-406(1)(j) MCA of the Montana Minimum Wage Law, exempts from the wage and hour provisions of the Law "any employee employed in a bona fide executive, administrative, or professional capacity" (as such terms are defined and delimited from time to time by regulations of the Administrator, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

(a) The duties and responsibilities of an exempt executive employee are described in subsection (a) through (d) of ARM 24.16.201. Subsection (e) of ARM 24.16.201 contains among other things, percentage limitations on the amount of time which an employee may devote to activities "which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of that section. For convenience in discussion, the work described in paragraphs (a) through (d) of ARM 24.16.201 and the activities directly and closely related to such work will be referred to as "exempt" work, while other activities will be referred to as "nonexempt" work.

(2) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

(a) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies providing for the safety of the men and property.

(3) A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employees time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his

salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

(4) Department or subdivision.

(a) In order to qualify under ARM 24.16.201 the employees managerial duties must be performed with respect to the enterprise in which he is employed or a customarily recognized department or subdivision. The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit which has a continuing function.

(b) In the vast majority of cases there is no difficulty in determining whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, it is clear that where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in charge of a subdivision of the enterprise. Questions arise principally in cases involving supervisors who work outside the employer's establishment, move from place to place, or have different subordinates at different times.

(c) In such instances, in determining whether the employee is in charge of a recognized unit with a continuing function, it is the Division's position that the unit supervised need not be physically within the employer's establishment and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential to the existence of a recognized unit with a continuing function, although in the ordinary case a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit. The following examples will illustrate these points.

(d) The projects on which an individual in charge of a certain type of work is employed may occur at different locations, and he may even hire most of his work force at these locations. The mere fact that he moves his location would not invalidate his exemption if there are other factors which show that he is actually in charge of a recognized unit with a continuing function in the organization.

(e) Nor will an otherwise exempt employee lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function. For instance, if this employee is in charge of the unit which has the continuing responsibility

for making all installations in a particular city or a designated portion of a city, he would be in charge of a department or subdivision despite the fact that he draws his subordinates from a pool of available men.

(f) It cannot be said, however, that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or a series of jobs from day to day or week to week has the status of an executive. Such an employee is not in charge of a recognized unit with a continuing function.

(5) Two or more other employees.

(a) An employee will qualify as an "executive" under ARM 24.16.201 only if he customarily and regularly supervises at least two fulltime employees or the equivalent. For example, if the "executive" supervises one full-time and two part-time employees of whom one works morning and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met. The "equivalent" of two full-time employees can therefore be met by part-time employees who do work a number of hours equal to the number of hours that would normally be worked by two fulltime employees.

(b) The employees supervised must be employed in the department which the "executive" is managing.

(c) It has been the experience of the Divisions that a supervisor of as few as two employees usually performs non- exempt work in excess of the general 20 percent tolerance provided in ARM 24.16.201.

(d) In a large machine shop there may be a machine-shop supervisor and two assistant machine-shop supervisors. Assuming that they meet all the qualifications of ARM 24.16.201 and particularly that they are not working foremen, they should certainly qualify for the exemption. A small department in a plant or in an office is usually supervised by one person. Any attempt to classify one of the other workers in the department as an executive merely by giving him an honorific title such as assistant supervisor will almost inevitably fail as there will not be sufficient true supervisory or other managerial work to keep two persons occupied. On the other hand, it is incorrect to assume that in a large department, such as a large shoe department in a retail store which has separate sections for men's, women's and children's shoes, for example, the supervision cannot be distributed among two or three employees, conceivably among more. In such instances, assuming that the other tests are met, especially the one concerning the performance of nonexempt work, each such employee "customarily and regularly directs the work of two or more other employees therein".

(e) An employee who merely assists the manager or buyer of a particular department and supervises two or more employees only in the actual manager's or buyer's absence, however, does not meet this requirement. For example, where a single unsegregated department, such as a women's sportswear depart-

ment or a men's shirt department in a retail store, is managed by a buyer, with the assistance of one or more assistant buyers, only one employee, the buyer, can be considered an executive, even though the assistant buyers at times exercise some managerial and supervisory responsibilities. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein".

(6) Authority to hire or fire. ARM 24.16.201 requires that an exempt executive employee have the authority to hire or fire other employees or that his suggestions and recommendations as to hiring or firing and as to advancement and promotion or any other change of status of the employees whom he supervises will be given particular weight. Thus, no employee, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to whom the hiring and firing functions are delegated.

(7) Discretionary powers.

(a) Subsection (d) of ARM 24.16.201 requires that an exempt executive employee customarily and regularly exercise discretionary powers. A person whose work is so completely routinized that he has no discretion does not qualify for exemption.

(b) The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

(8) Work directly and closely related.

(a) This phrase brings within the category of exempt work not only the actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities. The supervision of employees and the management of a department include a great many directly and closely related tasks which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible. Frequently such exempt work is of a kind which in establishments that are organized differently, or which are larger and have greater specialization of function, may be performed by a nonexempt employee hired especially for that purpose. Illustration

will serve to make clear the meaning to be given the phrase "directly and closely related".

(b) Keeping basic records of working time, for example, is frequently performed by a timekeeper employed for that purpose. In such cases the work is clearly not exempt in nature. In other establishments which are not large enough to employ a timekeeper, or in which the timekeeping function has been decentralized, the supervisor of each department keeps the basic time records of his own subordinates. In these instances, as indicated above, the timekeeping is directly related to the function of managing the particular department and supervising its employees. However, the preparation of a payroll by a supervisor, even the payroll of the employees under his supervision, cannot be considered to be exempt work, since the preparation of a payroll does not aid in the supervision of the employees or the management of the department. Similarly, the keeping by a supervisor of production or sales records of his own subordinates for use in supervision or control would be exempt work, while the maintenance of production records of employees under his direction would not be exempt work.

(c) Another example of work which may be directly and closely related to the performance of management duties is the distribution of materials or merchandise and supplies. Maintaining control of the flow of materials or merchandise and supplies in a department is ordinarily a responsibility of the managerial employee in charge. In many nonmercantile establishments the actual distribution of materials is performed by nonexempt employees under the supervisor's direction. In other establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials. In a large retail establishment, however, where the replenishing of stocks of merchandise on the sales floor is customarily assigned to a nonexempt employee, the performance of such work by the manager or buyer of the department is nonexempt. The amount of time the manager or buyer spends in such work must be offset against the statutory tolerance for nonexempt work. The supervision and control of a flow of merchandise to the sales floor, of course, is directly and closely related to the managerial responsibility of the manager or buyer.

(d) Setup work is another illustration of work which may be exempt under certain circumstances if performed by a supervisor. The nature of setup work differs in various industries and for different operations. Some setup work is typically performed by the same employees who perform the "production" work; that is, the employee who operates the machine also "sets it up" or adjusts it for the particular job at hand. Such setup work is part of the production

operation and is not exempt. In other instances the setting up of the work is a highly skilled operation which the ordinary production work or machine tender typically does not perform. In some plants, particularly large ones, such setup work may be performed by employees whose duties are not supervisory in nature. In other plants, however, particularly small plants, such work is a regular duty of the executive and is work performance of his subordinates and for the adequacy of the final product. Under such circumstances it is exempt work.

(e) Similarly, a supervisor who spot checks and examines the work of his subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to his managerial and supervisory functions. However, this kind of examining and checking must be distinguished from the kind which is normally performed by an "examiner," "checker," or "inspector," and which is really a production operation rather than a part of the supervisory function. Likewise, a department manager or buyer in a retail or service establishment who goes about the sales floor observing the work of sales personnel under his supervision to determine the effectiveness of their sales techniques, checking on the quality of customer service being given, or observing customer preferences and reactions to the lines, styles, types, colors, and quality of the merchandise offered, is performing work which is directly and closely related to his managerial and supervisory functions. His actual participation, except for supervisory training or demonstration purposes, in such activities as making sales to customers, replenishing stocks or merchandise on the sales floor, removing merchandise from fitting rooms and returning to stock or shelves, however, is not. The amount of time a manager or buyer spends in the performance of such activities must be included in computing the percentage limitation on nonexempt work.

(f) Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he "keeps an eye out for trouble" is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

(g) A work of caution is necessary in connection with these illustrations. The recordkeeping, material distribut-

ing, setup work, machine watching and adjusting, and inspecting, examining, observing and checking referred to in the examples of exempt work are presumably the kind which are supervisory and managerial functions rather than merely "production" work. Frequently it is difficult to distinguish the managerial type from the type which is a production operation. In deciding such difficult cases it should be borne in mind that it is one of the objectives of ARM 24.16.201 to exclude from the definition foreman who hold "dual" or combination jobs. Thus, if work of this kind taxes up a large part of the employee's time it would be evidence that management of the department is not the primary duty of the employee, that such work is a production operation rather than a function directly and closely related to the supervisory or managerial duties, and that the employee is in reality a combination foreman "setup" man, foreman-machine adjuster (or mechanic), or foreman-examiner, floorman-salesperson, etc., rather than a bona fide executive.

(9) Emergencies

(a) Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work, lose the exemption. Bona fide executives include among their responsibilities the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department of subdivision in their charge from damage due to unforseen circumstances, and the prevention of widespread breakdown in production, sales, or service operations. Consequently, when conditions beyond control arise which threaten the safety of the employees, or a cessation of operations, or serious damage to the employer's property, any manual or other normally nonexempt work performed in an effort to prevent such results is considered exempt work and is not included in computing the percentage limitation on nonexempt work.

(b) The rule is subsection (9) (a) above is not applicable, however, to nonexempt work arising out of occurrences which are not beyond control or for which the employer can reasonably provide in the normal course of business.

(c) A few illustrations may be helpful in distinguishing routine work performed as a result of real emergencies of the kind for which no provision can practicably be made by the employer in advance of their occurrence and routine work which is not in this category. It is obvious that a mine superintendent who pitches in after an explosion and digs out the men who are trapped in the mine is still a bona fide

executive during that week. On the other hand, the manager of a clothing establishment who personally performs the operations on expensive garments because he fears damage to the garment if he allows his subordinates to handle them is not performing "emergency" work of the kind which can be considered exempt. Nor is the manager of a department in a retail store performing exempt work when he personally waits on a special or impatient customer because he fears the loss of the sale or the customer's goodwill if he allows a salesperson to serve him. The performance of nonexempt work by executives during inventory-taking, during other periods of heavy workload, or the handling of rush orders are the kinds of activities which the percentage tolerances are intended to cover. For example, pitching in on the production line in a canning plant during seasonal operations is nonexempt "emergency" work even if the objective is to keep the food from spoiling. Similarly, pitching in behind the sales counter in a retail store during special sales or during Christmas or Easter or other peak sales periods is not "emergency" work, even if the objective is to improve customer service and the store's sales record. Maintenance work is not emergency work even if performed at night or during weekends. Relieving subordinates during rest or vacation periods cannot be considered in the nature of "emergency" work since the need for replacements can be anticipated. Whether replacing the subordinate at the work bench, or production line, or sales counter during the first day or partial day of an illness would be considered exempt emergency work would depend upon the circumstances in the particular case. Such factors as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly would all have to be weighed.

(d) All the regular cleaning up around machinery, even when necessary to prevent fire or explosion, is not "emergency" work. However, the removal by an executive of dirt or obstructions constituting a hazard to life or property need not be included in computing the percentage limitation if it is not reasonable practicable for anyone but the supervisor to perform the work and it is the kind of "emergency" which has not been recurring. The occasional performance of repair work in case of a breakdown of machinery, or the collapse of a display rack, or damage to or exceptional disarray of merchandise caused by accident or a customer's carelessness may be considered exempt work if the breakdown is one which the employer cannot reasonably anticipate. However, recurring breakdowns or disarrays requiring frequent attention, such as that of an old belt or machine which breaks down repeatedly or merchandise displays constantly requiring resorting or straightening, are the kind for which provision could reasonably be made and repair of which must be consid-

ered as nonexempt.

(10) Occasional tasks.

(a) In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specially assigned to the "executive" but are performed by him in his discretion.

(b) It might be possible for the executive to take one of his subordinates away from his usual task, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any other of these tasks is done frequently, however, it takes on the character of a regular production which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is;

(i) the same as the work performed by any of the subordinates of the executive; or

(ii) a specifically assigned task of the executive employees; or

(iii) practicably delegable to nonexempt employees in the establishment; or

(iv) repetitive and frequently recurring.

(11) Nonexempt work generally.

(a) As indicated in subsection (b) of ARM 24.16.204 the term "nonexempt work", as used in this subpart includes all work other than that described in ARM 24.16.201 (a) through (d) and the activities directly and closely related to such work.

(b) Nonexempt work is easily identifiable where, as in the usual case, it consists of work of the same nature as that performed by the nonexempt subordinates of the "executive". It is more difficult to identify in cases where supervisory employees spend a significant amount of time in activities not performed by any of their subordinates and not

consisting of actual supervision and management. In such cases careful analysis of the employee's duties with reference to the phrase "directly and closely related to the performance of the work" will usually be necessary in arriving at a determination.

(12) Percentage limitations on nonexempt work.

(a) An employee will not qualify for exemption as an executive if he devotes more than 20 percent, or in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work. This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

(b) The maximum allowance of 20 percent for nonexempt work applies to the establishment by which the employee is employed. Such an establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services. Types of establishments which may meet these tests include stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); public parking lots and parking garages; auto repair shops; gasoline service stations; funeral homes; cemetaries; etc.

(c) There are two special exceptions to the percentage limitations of subsection (a):

(1) That relating to the employee in "sole charge" of an independent or branch establishment, and

(2) That relating to an employee owning a 20 percent interest in the enterprise in which he is employed.

These except the employee only from the percentage limitations on nonexempt work. They do not except the employee from any of the other requirements of ARM 24.16.201. Thus, while the percentage limitations on nonexempt work are not applicable, it is clear than an employee would not qualify for the exemption if he performs so much nonexempt work that he could no longer meet the requirement of ARM 24.16.201 that his primary duty must consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof.

(13) Sole-charge exception.

(a) An exception from the percentage limitations on nonexempt work is provided in ARM 24.16.201 subsection (e) for "an employee who is in sole charge of an independent establishment or a physically separated branch establishment ***". Such an employee is considered to be employed in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work.

(b) The term "independent establishment" must be given full weight. The establishment must have a fixed location and must be geographically separated from other company property.

The management of operations within one among several buildings located on a single or adjoining tracts of company property does not qualify for the exemption under this heading. In the case of a branch, there must be a true and complete physical separation from the main office.

(c) A determination as to the status as "an independent establishment or a physically separated branch establishment" of any part of the business operations on the premises of a retail or other establishment, however, must be made on the basis of the physical and economic facts in the particular situation. A leased department cannot be considered to be a separate establishment where, for example, it and the retail store in which it is located operate under a common trade name and the store may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies, and matters such as advertising, adjustment and credit operations, insurance and taxes, are handled on a unified basis by the store.

A leased department may qualify as a separate establishment, however, where, among other things, the facts show that the lessee maintains a separate entrance and operates under a separate name, with its own separate employees and records, and in other respects conducts his business independently of the lessor's. In such a case the leased department would enjoy the same status as a physically separated branch store.

(d) Since the employee must be in "sole" charge, only one person in any establishment can qualify as an executive under this exception, and then only if he is the top person in charge at that location. Thus, it would not be applicable to an employee who is in charge of a branch establishment but whose superior makes his office on the premises. An example is a district manager who has overall supervisory functions in relation to a number of branch offices, but makes his office at one of the branches. The branch manager at the branch where the district manager's office is located is not in "sole-charge" of the establishment and does not come within the exception. This does not mean that the "sole-charge" status of an employee will be considered lost because of an occasional visit to the branch office of the superior of the person in charge, or in the case of an independent establishment, by the visit for a short period on one or two days a week of the proprietor or principal corporate officer of the establishment. In these situations, the sole-charge status of the employee in question will appear from the facts as to his functions, particularly in the intervals between visits. If, during these intervals, the decisions normally made by an executive in charge of a branch or an independent establishment are reserved for the superior, the employee is not in sole-charge. If such decisions are not reserved for the superior, the sole-charge status will not be lost merely

because of the superior's visits.

(e) In order to qualify for the exception the employee must ordinarily be in charge of all the company activities at the location where he is employed. If he is in charge of only a portion of the company's activities at his location, then he cannot be said to be in sole-charge of an independent establishment or a physically separated branch establishment. In exceptional cases the Division has found that an executive employee may be in sole-charge of all activities at a branch office except that one independent function which is not integrated with those managed by the executive is also performed at the branch. This one function is not important to the activities managed by the executive and constitutes only an insignificant portion of the employer's activities at that branch. A typical example of this type of situation is one in which "desk space" in a warehouse otherwise devoted to the storage and shipment of parts is assigned a salesman who reports to the salesmanager or other company official located at the home office. Normally only one employee (at most two or three, but in any event an insignificant number when compared with the total number of persons employed at the branch) is engaged in the nonintegrated function for which the executive whose sole-charge status is in question is not responsible. Under such circumstances the employee does not lose his "sole-charge" status merely because of the desk-space assignment.

(14) Exception for owners of 20 percent interest.

(a) An exception from the percentage limitations on nonexempt work is provided in ARM 24.16.201, subsection (e) for an employee "who owns at least 20 percent interest in the enterprise in which he is employed". This provision recognizes the special status of a shareholder of an enterprise who is actively engaged in its management.

(b) The exception is available to an employee owing a bona fide 20 percent equity in the enterprise in which he is employ-ed regardless of whether the business is a corporate or other type of organization.

(15) Working foremen.

(a) The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is unrelated or only remotely related to his supervisory activities.

(b) One type of working foreman or working supervisor most commonly found in industry works alongside his subordinates. Such employees, sometimes known as strawbosses, or gang or group leaders perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. Clearly, the work of the same nature as that performed by the employee's subordinates must be counted as nonexempt work and if the amount of such work performed is

substantial the exemption does not apply. A foreman in a dress shop, for example, who operates a sewing machine to produce the product is performing clearly nonexempt work. However, this should not be confused with the operation of a sewing machine by a foreman to instruct his subordinates in the making of a new product, such as a garment, before it goes into production.

(c) Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his duties. Such an employee is in effect holding a dual job. He may be, for example, a combination foreman-production worker, supervisor-clerk, or foreman combined with some other skilled or unskilled occupation. His nonsupervisory duties in such instances are unrelated to anything he must do to supervise the employees under him or to manage the department. They are in many instances mere "fill-in" tasks performed because the job does not involve sufficient executive duties to occupy an employee's full time. In other instances the nonsupervisory, nonmanagerial duties may be the principal ones and the supervisory or managerial duties are subordinate and are assigned to the particular employee because it is more convenient to rest the responsibility for the first line of supervision in the hands of the person who performs these other duties. Typical of employees in dual jobs which may involve a substantial amount of nonexempt work are:

(i) Foremen or supervisors who also perform one or more of the "production" or "operating" functions, though no other employees in the plant perform such work. An example of this kind of employee is the foreman in a millinery or garment plant who is also the cutter, or the foreman in a garment factory who operates a multiple-needle machine not requiring a full-time operator.

(ii) Foreman or supervisors who have a regular part of their duties the adjustment, repair, or maintenance of machinery or equipment. Examples in this category are the foreman-fixer in the hosiery industry who devotes a considerable amount of time to making adjustments and repairs to the machines of his subordinates, or the planer-mill foreman who is also the "machine man" who repairs the machines and grinds the knives.

(iii) Foreman or supervisors who perform clerical work other than the maintenance of the time and production records of their subordinates; for example, the foreman of the shipping room who makes out the bills of lading and other shipping records, the warehouse foreman who also acts as inventory clerk, the head shipper who also has charge of a finished goods stock room, assisting in placing goods on shelves and keeping perpetual inventory records, or the

office manager, head bookkeeper, or chief clerk who performs routine bookkeeping. There is no doubt that the head bookkeeper, for example who spends a substantial amount of his time keeping books of the same general nature as those kept by the other bookkeepers, even though his books are confidential in nature or cover different transactions from the books maintained by the under bookkeepers, is not primarily an executive employee and should not be so considered.

(16) Trainees, executive. The exemption is applicable to an employee employed in a bona fide executive capacity and does not include employees training to become executives and not actually performing the duties of an executive.

(17) Amount of Salary required.

(a) Except as otherwise noted in (b) of this subsection, compensation on a salary basis at a rate of not less than $150 per week, exclusive of board, lodging, or other facilities, is required for exemption as an executive. The $150 a week may be translated into equivalent amounts for periods longer than one week. The requirement, will be met if the employee is compensated biweekly on a salary basis of $300, semimonthly on a salary basis of $325 or monthly on a salary basis of $650. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.

(b) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations do not prohibit the sale of such facilities to executives on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

(18) Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(i) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(ii) Deductions may be made, however, when the employee absents himself from work for a day or more for personal

reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(iii) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents), if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirements will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(iv) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met for example, by a branch manager who receives a salary of $150 or more per week and, in addition, a commission of one percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or

other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in any week in which he performs any work. Such arrangements are subject to the exceptions in subsection (a) of this subsection (18). The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $175 a week may not arbitrarily be divided into a guaranteed minimum of $125 paid in each week in which any work is performed, and an additional $50 which is made subject to deductions which are not permitted under subsection (a) of this subsection (18).

(c) Initial and terminal weeks. Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

(19) Special provision for high salaried executives.

(a) Except as otherwise noted in subsection (b) of subsection (19), ARM 24.16.204 contains a special proviso for managerial employees who are compensated on a salary basis at a rate of not less than $200 per week, exclusive of board, lodging, or other facilities. Such a highly paid employee is deemed to meet all the requirements in subsections (a) through (f) of ARM 24.16.201 if his primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test his qualifications in detail under paragraphs (a) through (f) of ARM 24.16.201.

(b) Mechanics, carpenters, linotype operators, or craftsmen or other kinds are not exempt under the proviso no matter how highly paid they might be. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406(1)(j), MCA; Eff. 12/31/72.)

24.16.205 EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

(1) Types of administrative employees.

(a) Three types of employees are described in subsec-

tion (3) ARM 24.16.202 who, if they meet the other tests in ARM 24.16.202 qualify for exemption as "administrative" employees.

(i) Executive and administrative assistants. The first type is the assistant to a proprietor or to an executive or administrative employee. In modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking such assistants are found in large establishments, where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence and interviews must be delegated.

(ii) Staff employees.

Employees included in the second alternative in the definition are those who can be described as staff rather than line employees, or as functional rather than departmental heads. They include among other employees who act as advisory specialists are tax experts, insurance experts, sales research experts, wage-rate analysts, investments consultants, foreign exchange consultants, and statisticians. Also included are persons who are in charge of a so-called functional department, which may frequently be a one-man department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.

(iii) Those who perform special assignments.

The third group consists of persons who performed away from the employer's place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies. It should be particularly noted that this is a field which is rife with honorific titles that do not adequately portray the nature of the employee's duties. The field representative of a utility company, for example, may be a "glorified serviceman". This classification also includes employees whose special assignments are performed entirely or partly inside their employer's place of business. Examples are special organization planners, so-called account executives in advertising firms and contact or promotion men of various types.

(b) Job titles insufficient as yardsticks.

(i) The employees for whom exemption is sought under the term "administrative" have extremely diverse functions and a wide variety of titles. A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status

under the regulations. Titles can be had cheaply and are of no determinative value. Thus, while there are supervisors of production control (whose decisions affect the welfare of large numbers of employees) who qualify for exemption under section 39-3-406(1)(i) MCA, it is not hard to call a rate setter (whose functions are limited to timing certain operations and jotting down times on a standardized form) a "methods engineer" or a production-control supervisor".

(ii) Many more examples could be cited to show that titles are insufficient as yardsticks. As has been indicated previously, the exempt or nonexempt status of any particular employees must be determined on the basis of whether his duties, responsibilities and salary meet all the requirements of the appropriate section of the regulations.

(2) Categories of work.

(a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition:

(i) The work specifically described in subsections (1), (2) and (3) of ARM 24.16.202.

(ii) Routine work which is directly and closely related to the performance of the work which is described in subsections (1), (2), and (3) of ARM 24.16.202; and

(iii) Routine work which is not related or is only remotely related to the administrative duties.

(b) The work in category (ii), that which is specifically described in ARM 24.16.202 as requiring the exercise of discretion and independent judgment, is clearly exempt in nature.

(c) Category (ii) consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but which has a direct and close relationship to the performance of the more important duties. The directness and closeness of this relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This "directly and closely related" work includes routine work which necessarily arises out of the administrative duties, and routine work without which the employee's more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

(d) These "directly and closely related" duties are

distinguishable from the last group, category (iii), those which are remotely related or completely unrelated to the more important tasks. The work in this last category is nonexempt and must not exceed the 20 percent limitation for nonexempt work (up to 40 percent in the case of an employee of a retail or service establishment) if the exemption is to apply.

(3) Nonmanual work.

(a) The requirement that the work performed by an exempt administrative employee must be office work or non-manual work restricts the exemption to "white-collar" employees who meet the tests. If the work performed is "office" work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term "administrative" only employees who are basically white-collar employees since the accepted usage of the term "white-collar" includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of ARM 24.16.202 (although they would not qualify as administrative employees since they do not meet the other requirements of ARM 24.16.202.)

(b) ARM 24.16.202 does not completely prohibit the performance of manual work by an "administrative" employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principal that the exemption is limited to "white-collar" employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a "white-collar" employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of MCA ARM 24.16.202. An office employee, on the other hand, is a "white-collar" worker, and would not lose the exemption on the grounds that he is not primarily engaged in "nonmanual" work, although he would lose the exemption if he failed to meet any of the other requirements.

(4) Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the

types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business not withstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those whose work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(i) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance of the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mill positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(ii) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment

may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in ARM 24.16.202.

(iii) Some firms employ persons whom they describe as "statisticians". If all such a person does in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analysis of data and draws conclusions which are important to the determination or, or which in fact, determine financial merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(A) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(B) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, promotion men, and many others.

(C) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(d) Under ARM 24.16.202 the "management policies or

general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, or resident buyers. Such employees, if they meet the other requirements of ARM 24.16.202, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers, or those of their employer.

(5) Primary duty.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employees must have as his primary duty, office or nonmanual work directly related to management policies or general business operations of his employers or his employer's customers.

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in section (3) of ARM 24.16.204 in the discussion of "primary duty" under the definition of "executive" are applicable.

(6) Discretion and independent judgment.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the explanation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following:

(i) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and

(ii) Misapplication of the term to employees making decisions relating to matters of little consequence.

(c) Distinguished from skills and procedures:

Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specific standards are met or whether an object falls into one or another of a number of

definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising descretion and independent judgment within the meaning of ARM 24.16.202. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(i) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations.

(ii) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations. The mere fact that the employee uses his knowledge and experience does not change his decision, i.e., that the product does or does not conform with the established standard, into a real decision in a significant matter.

(iii) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judg-

ment as contemplated by the regulations. In addition, in those situations in which an otherwise exempt buyer does grading, the grading, even though routine work may be considered exempt if it is directly and closely related to the exempt buying.

(iv) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for the employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations. On the other hand an exempt personnel manager will often perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(v) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however by the buyer who evaluates the assistant's reports and on the basis of their findings directs that certain items be repriced. When performed by the buyer who actually makes the decisions which effect the buying or pricing policies of the department he manages, the comparison shopping although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(d) Decisions in significant matters:

(i) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truck driver to decide which

route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and judgment of the level contemplated by the regulations. The Division has consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(ii) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations, does not apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise.

(iii) The regulations, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations also contemplate the kind of discretion and independent judgment exercise by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiations on behalf of their employers.

(e) Final decisions not necessary:

(i) The term "discretion and independent judgment" as used in the regulations does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact

that an employee's decision may be subject to review and that upon occasion the decisions are reviewed or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This action by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(ii) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

(f) Distinguished from loss through neglect: A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and in related routine bookkeeping duties may, be crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations.

(g) Customarily and regularly: The work of an exempt

administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

(7) Directly and closely related.

(a) As indicated in ARM 24.16.205, work which is directly and closely related to the performance of the work described in ARM 24.16.202 is considered exempt work. Some illustrations may be helpful in clarifying the differences between such work and work which is unrelated or only remotely related to the work described in ARM 24.16.202.

(b) For purposes of illustration, the case of a high- salaried management consultant about whose exempt status as an administrative employee there is no doubt will be assumed. The particular employee is employed by a firm of consultants and performs work in which he customarily and regularly exercises discretion and independent judgment. The work consists primarily of analyzing and recommending changes in, the business operations of his employer's client. This work falls in the category of exempt work described in ARM 24.16.202.

(i) In the course of performing that work, the consultant makes extensive notes recording the flow of work and materials through the office and plant of the client. Standing alone or separated from the primary duty such note-making would be routine in nature. However, this is work without which the more important work cannot be performed properly. It is "directly and closely related" to the administrative work and is therefore exempt work. Upon his return to the office of his employer the consultant personally types his report and draws, first in rough and then in final form, a proposed table of organization to be submitted with it. Although all this work may not be essential to the proper performance of his more important work, it is all directly and closely related to that work and should be considered exempt. While it is possible to assign the typing and final drafting to nonexempt employees and in fact it is frequently the practice to do so, it is not required as a condition of exemption that it be so delegated.

(ii) Finally, if because this particular employee has a special skill in such work, he also drafts tables or organization proposed by other consultants, he would then be performing routine work wholly unrelated, or at best only remotely related, to his more important work. Under such conditions, the drafting is nonexempt.

(c) Another illustration is the credit manager who

makes and administers the credit policy of his employer. Establishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in ARM 24.16.202. Work which is directly and closely related to these exempt duties may include such activities as checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis and writing letters giving credit data and experience to other employers or credit agencies. On the other hand, any general office or bookkeeping work is nonexempt work. For instance, posting to the accounts receivable ledger would be only remotely related to his administrative work and must be considered nonexempt.

(d) One phase of the work of an administrative assistant to a bona fide executive or administrative employee provides another illustration. The work of determining whether to answer correspondence personally, call it to his superior's attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in ARM 24.16.202. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person, would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.

(e) The following additional examples may also be of value in applying these principles. A traffic manager is employed to handle the company's transportation problems. The exempt work performed by such an employee would include planning the most economical and quickest routes for shipping merchandise to and from the plant, contracting for commoncarrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking "city orders" (for local deliveries) over the telephone. The order-taking is a routine function not "directly and closely related" to the exempt work and must be considered nonexempt.

(f) An office manager who does not supervise two or more employees would not meet the requirements for exemption as an executive employee but may possibly qualify for exemption as an administrative employee. Such an employee may perform administrative duties, such as the execution of the employer's credit policy, the management of the company's traffic, purchasing, and other responsible office work requiring the customary and regular exercise of discretion and

judgment, which are clearly exempt. On the other hand, this office manager may perform all the bookkeeping, prepare the confidential or regular payrolls, and send out monthly statements of account. These latter activities are not "directly and closely related" to the exempt functions and are not exempt.

(8) Percentage limitations on nonexempt work.

(a) Under subsection (d) of ARM 24.16.201 an employee will not qualify for exemption as an administrative employee if he devotes more than 20 percent, or, in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work; that is, to activities which are not directly and closely related to the performance of the work described in subsections (1) through (3) of ARM 24.16.202.

(b) This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

(c) The tolerance for nonexempt work allows the performance of nonexempt manual or nonmanual work within the percentages allowed for all types of nonexempt work.

(d) Refer to subsection (12) (b) of ARM 24.16.204 for the definition of a retail or service establishment as this term is used in paragraph (a) of this section.

(9) Trainees, administrative. The exemption is applicable to an employee employed in a bona fide administrative capacity and does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee.

(10) Amount of salary or fees required.

(a) Except as otherwise noted in subsection (b) of this subsection, compensation on a salary or fee basis at a rate of not less than $150 a week, exclusive of board, lodging, or other facilities, is required for exemption as an "administrative" employee. The requirement will be met if the employee is compensated biweekly on a salary basis of $300, semimonthly on a salary basis of $325, or monthly on a salary basis of $650.

(b) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations do not prohibit the sale of such facilities to administrative employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

(11) Salary basis. The explanation of the salary basis of payment made in subsection (18) of ARM 24.16.204 in connection with the definition of "executive" is also applicable in the definition of "administrative".

(12) Fee basis. The requirements for exemption as an administrative employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis. For a discussion of payment on a fee basis,

see subsection (13) of ARM 24.16.206.

(13) Special proviso for high salaried administrative employees.

(a) Except as otherwise noted in paragraph (b) of this subsection, ARM 24.16.206 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $200 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee engaged in such work as his primary duty is deemed to meet all the requirements in subsections (1) through (5). If an employee qualifies for exemption under this proviso, it is not necessary to test his qualifications in detail under (1) through (5). (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406 (1)(j) MCA; Eff. 12/31/72.)

24.16.206 EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY (1) General. The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions, such as acting or music. Since the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both groups.

(2) Learned professions.

(a) The "learned" professions are described in subsection (1)(a) of ARM 24.16.203 as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the highschool level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose work is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but is does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

(e) No need appears to translate the word "prolonged" into arithmetical terms. Generally speaking, the professions which meet this requirement will include law, medicine, nursing, accountancy, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, including pharmacy and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not absolutely universal) prerequisite.

(f) Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). However, exemption of accountants, as in the case of other occupational groups (subsection (8)), must be determined on the basis of the individual employees duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests contained in ARM 24.16.203. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "professional" employee.

Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant", however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

(3) Artistic professions.

(a) The requirements concerning the character of the artistic type of professional work are contained in subsection (1) (a)(ii) of ARM 24.16.206. Work of this type is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

(b) The work must be "in a recognized field of artistic endeavor." This includes such fields as music, writing, the theater, and the plastic and graphic arts.

(c) (i) The work must be original and creative in character, as opposed to work in which can be produced by a person endowed with general manual or intellectual ability and training. In the field of music there should be little difficulty in ascertaining the application of this requirement. Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition. In the plastic and graphic arts the requirements are, generally speaking, met by painters who at most are given the subject matter of their painting. It is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. It would not normally be met by a person who is employed as a copyist, or as an "animator" of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

(ii) In the field of writing the distinction is perhaps more difficult to draw. Obviously the requirement is met by essay- ists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed). The requirement would also be met, generally speaking, by persons holding the more responsible writing position in advertising agencies.

(d) Another requirement is that the employee be engaged in work "the result of which depends primarily on the invention, imagination, or talent of the employee". This requirement is easily met by a person employed as an actor, or a singer, or a violinist, or a short-story writer. In the case

of newspaper employees the distinction here is similar to the distinction observed above in connection with the requirement that the work be "original and creative in character". Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on "invention, imagination, or talent". On the other hand, this requirement will normally be met by actors, musicians, painters, and other artists.

(e) The field of journalism also employs many exempt as well as many nonexempt employees under the same or similar job titles. Newspaper writers and reporters are the principal categories of employment in which this is found.

(i) Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements of subsection (a) of ARM 24.16.206 for exemption as profes- sional employees of the "learned" type. Exemption for newspaper writers as professional employees is normally available only under the provisions for professional employees of the "artistic" type. Newspaper writing of the exempt type must therefore, be "predominantly original and creative in character". Only writing which is analytical, interpretative or highly individualized is considered to be creative in nature. (The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work.) Newspaper writers commonly performing work which is original and creative within the meaning of ARM 24.16.203 are editorial writers, columnists, critics, and "top-flight" writers of analytical and interpretative articles.

(ii) The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character within the meaning of and must be considered as non- exempt work. Thus, a reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite man or other editorial employees for story preparation. Such work is nonexempt work. The leg man, the reporter covering a police beat, the reporter sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature within the meaning of the Act and ARM 24.16.
203.

(iii) Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as non-exempt work. Thus, if a dramatic critic interviews an actor and writes a story around the interview, the work of interviewing him and writing the story would not be considered as nonexempt work. However, a dramatic critic who is assigned to cover a routine news event such

as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his work as a dramatic critic.

(4) Primary duty.

(a) For a general explanation of the term "primary duty" see the discussion of this term under "executive" in subsection (3) of ARM 24.16.204. See also the discussion under "administrative" in subsection (5).

(5) Discretion and judgment.

(a) Under ARM 24.16.203 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.

(b) A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

(6) Predominantly intellectual and varied. ARM 24.16.203 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 20 physical examinations in the morning and perform in the course of his examinations essentially similar tests, it requires not only judgment and discretion on his part but a continual variety in his interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed.

(7) Essential part of and necessarily incident to.

(a) Subsection (d) of ARM 24.16.203, it will be noted, has the effect of including within the exempt work activities which are an essential part of and necessarily incident to the professional work described in subsections (a) through (c). This provision recognized the fact that there are professional employees whose work necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most menial tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants. See also the example of incidental interviewing or investigation in subsection (3) (e) (iii) of ARM 24.16.206.

(b) It should be noted that the test of whether routine work is exempt is different in the definition of "professional" from that in the definition of "executive" and "administrative". Thus, while routine work will be exempt if it is "directly and closely related" to the performance of

the professional duties will not be exempt unless it is also "an essential part of and necessarily incident to" the professional work.

(8) Nonexempt work generally.

(a) It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of any individual depends upon his duties and other qualifications.

(b) It is necessary to emphasize the fact that Section 39-3-406(1)(j)MCA exempts "any employee employed in a bona fide * * * professional capacity". It does not exempt all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt as such, those learning a profession. Moreover, it does not exempt persons with professional training, who are working in professional fields, but performing subprofessional or routine work. For example, in the field of library science there are large numbers of employees who are trained librarians but who, nevertheless, do not perform professional work or receive salaries commensurate with recognized professional status. The field of "engineering" has many persons with "engineer" titles, who are not professional engineers, as well as many who are trained in the engineering profession, but are actually working as trainees, junior engineers, or draftsmen.

(9) 20-percent nonexempt work limitation. Time spent in nonexempt work, that is, work which is not an essential part of and necessarily incident to the exempt work, is limited to 20 percent of the time worked by the employee in the workweek.

(10) Trainees, professional. The exemption applies to an employee employed in a bona fide professional capacity and does not include trainees who are not actually performing the duties of a professional employee.

(11) Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this subsection, compensation on a salary or fee basis at a rate of not less than $150 per week, exclusive of board, lodging, or other facilities, is required for exemption as a "professional" employee. An employee will meet the requirement if he is paid a biweekly salary of $300, a semi monthly salary of $325, or a monthly salary of $650.

(b) The payment of the compensation specified in subsection (a) or (b) of this subsection is not a requisite for exemption in the case of employees exempted from this requirement by the proviso to subsection (e) of ARM 24.16.204, as explained in subsection (14) of ARM 24.16.206.

(c) The payment of the required salary must be exclu-

sive of board, lodging, or other facilities; that is free and clear. On the other hand, the regulations do not prohibit the sale of such facilities to professional employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

(12) Salary basis. The salary basis of payment is explained in subsection (18) of ARM 24.16.204 in connection with the definition of "executive".

(13) Fee basis.

(a) The requirement for exemption as a professional (or administrative) employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis.

(b) Little or no difficulty arises in determining whether a particular employment arrangement involves payment on a fee basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piece-work payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. The type of payment contemplated in the regulations is thus readily recognized.

(c) The adequacy of a fee payment - whether it amounts to payment at a rate of not less than $150 per week to a professional employee or at a rate of not less than $150 per week to an administrative employee can ordinarily be determined. In determining whether payment is at the rate specified in the regulations, the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate which would amount to at least $150 per week to a professional employee or at a rate of not less than $150 per week to an administrative employee can ordinarily be determined only after the time worked on the job has been determined. In determining whether payment is at the rate specified in the regulations, the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate which would amount to at least $150 per week to a professional employee or at a rate of not less than $150 per week to an administrative employee if 40 hours were worked.

(d) The following examples will illustrate the principle stated above:

(i) A singer receives $50 for a song on a 15 minute program (no rehearsal time is involved). Obviously the re-

quirement will be met since the employee would earn $150 at this rate of pay in far less than 40 hours.

(ii) An artist is paid $90 for a picture. Upon completion of the assignment, it is determined that the artist worked 20 hours. Since earnings at this rate would yield the artist $180 if 40 hours were worked, the requirement is met.

(iii) An illustrator is assigned the illustration of a pamphlet at a fee of $120. When the job is completed it is determined that the employee worked 60 hours. If he worked 40 hours at this rate, the employee would have earned only $100. The fee payment of $120 for work which required 60 hours to complete therefore does not meet the requirement of payment at a rate of $150 per week and the employee must be considered nonexempt. It follows that if in the performance of this assignment the illustrator worked in excess of 40 hours in any week, overtime rates must be paid. Whether or not he worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees.

(14) Exception for physicians and lawyers.

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

(i) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialist, and osteopathic physicians (doctors of osteopathy). Other practit-ioners in the field of medical science and healing may include podiatrists (some times called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).

(ii) Physicians and other practitioners included in subsection (i) of this subsection, whether or not licensed to practice prior to commencement of an internship or resident program, are expected from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession.

(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians,

dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

(15) Special proviso for high salaried professional employees.

(a) Except as otherwise noted in subsection (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $200 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exception in subsections (a) through (e) of ARM 24.16.203 will be deemed to be met by an employee who consists of the performance or work requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test his qualifications in detail under subsections (a) through (e) of ARM 24.16.203. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406(1)(j), MCA; Eff. 12/31/72.)

Sub-Chapters 3 and 4 Reserved

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Sub-Chapter 5

General Coverage of Wage and Hour Provisions

24.16.501 WORKWEEK (1) A workweek is a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not coincide with the calendar week - it may begin any day of the week and any hour of the day. Each workweek stands alone. Employment for two or more workweeks cannot be averaged out for the sake of figuring overtime or minimum wages. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the law. The workweek is to be taken as the standard in determining the applicability of the law. Thus if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the law for all the time worked in that week, unless exempted there from by some specific provision of the law. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the law.

(2) It is thus recognized that an employee may be subject to the law in one workweek and not in the next. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.502 COVERAGE NOT DEPENDENT ON METHOD OF COMPENSATION The law's coverage is not limited to employees working on an hourly wage. The requirement of section 39-3-404 MCA as to minimum wages on and after July 1, 1976, is that "each" employee must be paid wages at a rate not less than $2.00 an hour. This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. "Each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement. Regulations prescribed by the administrator provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 MCA; Eff. 12/31/72.)

24.16.503 COVERAGE NOT DEPENDENT ON PLACE OF WORK The law contains no prescription as to the place where the employee must work in order to come within its coverage. It follows that employees otherwise coming within the terms of the law are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404, MCA; Eff. 12/31/72.)

Sub-Chapter 6 Reserved

NEXT PAGE IS 24-1001

Sub-Chapter 7

Special Minimum Wages for Handicapped Workers
in Competitive Employment

24.16.701 DEFINITIONS (1) "Handicapped workers" means an individual whose earnings is impaired by age or physical or mental deficiency or injury for the work he is to perform.

(2) "Handicapped trainee" or "trainee" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury, and who is receiving or is scheduled to receive on-the-job training in industry under any vocational rehabilitation program administered by the Veterans Administration or an authorized vocational rehabilitation agency operation pursuant to the Vocational Rehabilitation Act.

(3) "State Agency" shall mean the "Department of Social and Rehabilitation Services.

(4) "Institutions" mean that state institution engaged in the custody and caring for of the worker or trainee.

(5) State institution is an institution operated by the State of Montana. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406(1)(f), MCA; NEW; Eff. 12/31/72.)

24.16.702 APPLICATION FOR CERTIFICATE Applications for employment under special certificate of handicapped workers at wages lower than the minimum wage applicable under section 39-3-406(f) MCA of the act must be approved by the Department of Social and Rehabilitative Services; Institutions caring for the handicapped, or individuals must seek application from the Commissioner of Labor. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-406(1)(f), MCA; NEW, Eff. 12/31/72.)

Sub-Chapters 8 and 9 Reserved

Sub-Chapter 10

Hours Worked

24.16.1001 INTRODUCTORY STATEMENT Section 39-3-304 MCA of the Montana Minimum Wage and Overtime Compensation Act requires that each employee, not specifically exempted, receive a specified minimum wage. Section 39-3-404, MCA of the act provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No reference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Employment Relations Division, Montana Department of Labor, Helena, Montana. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1002 GENERAL REQUIREMENTS (1) Section 39-3-404, MCA requires the payment of a minimum wage by an employer to his employees who are subject to the act. Section 39-3-405 MCA prohibits their employment for more than a specified number of hours per week without proper overtime compensation.

(2) By statutory definition the term "employ" includes (section 39-3-402(2) MCA) "to suffer or permit to work".

(3) In general, "hours worked" includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all time during which he is suffered or permitted to work for the employer. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 404, MCA; Eff. 12/31/72.)

24.16.1003 JUDICIAL CONSTRUCTION The United States Supreme Court originally stated that employees subject to the Fair Labor Standards Act must be paid for all time spent in "physical or mental exertion whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business." Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944). Subsequently, the court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part of all

employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer". Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944). The workweek ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72).

24.16.1004 EFFECT OF CUSTOM, CONTRACT OR AGREEMENT The principles are applicable even though there may be a custom, contract, or agreement not to pay for the time so spent. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1005 EMPLOYEES "SUFFERED OR PERMITTED" TO WORK (1) General. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

(2) Work performed away from the premises or job site. The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

(3) Duty of management. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

(4) Waiting time, general. Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged".

(5) On duty. A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks

to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.

(6) Off duty.

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is used effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Helena, to Billings, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip, the idle time is not working time. He is waiting to be engaged.

(7) On call time. An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1006 REST AND MEAL PERIODS (1) Rest. Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time

such as compensable waiting time or on-call time.

(2) Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive while eating. For example, an office employee who is required to be at his machine is working while eating.

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1007 SLEEPING TIME AND CERTAIN OTHER ACTIVITIES (1) General. Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

(2) Less than 24 hour duty. An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime.

(3) Duty of 24 hours or more.

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

(b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours sleep during the scheduled period the entire time is working time.

(4) Employees residing on employer's premises or working at home. An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1008 PREPARATORY AND CONCLUDING ACTIVITIES (1) Principal Activities.

(a) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are:

(i) In connection with the operation of a lathe, an employee will frequently at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(ii) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities, which the commissioner has always regarded as work as compensable under the Montana Minimum Wage Law, remain so, regardless of contrary custom or contract.

(b) Among the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities it would be considered as a "preliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not

ordinarily be regarded as integral parts of the principal activity or activities.

(2) Illustrative U.S. Supreme Court Decisions. These principles have guided the Administrator in the enforcement of the law. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employee's jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. Steiner v. Mitchell, 350 U.S. 247 (1956). In another case Knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday. (Mitchell v. King Packing Co., 350 U.S. (1956). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employee's principal activities. (History: Sec. 39-3-403, MCA; IMP, 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1009 LECTURES, MEETINGS AND TRAINING PROGRAMS (1) General. Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

(2) Involuntary attendance. Attendance is not voluntary. Of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

(3) Training directly related to employee's job. The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside or regular working hours, need not be counted as working time. Where a training course is instituted for the bone fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in

doing his regular work.

(4) Independent training. Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

(5) Special situations. There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such course outside of working hours would not be hours worked even if they are directly related to his job or paid for by the employer.

(6) Apprenticeship training. As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the bureau of apprenticeship and training of the U.S. department of labor and the apprenticeship and training bureau of the Montana department of labor and industry; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked. (History: Sec. 39-3-402, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1010 TRAVEL TIME (1) General. The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved.

(2) Home to work; ordinary situation. An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

(3) Home to work in emergency situations. There may be instances when travel from home to work is worktime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel

a substantial distance to perform an emergency job for one of his employer's customers, all time spent on such travel is working time. Travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

(4) Home to work on special one day assignment in another city. A problem arises when an employee who regularly works at a fixed location in one city is given a special one day work assignment in another city. For example, an employee who works in Helena, with regular working hours from 9 a.m. to 5 p.m., may be given a special assignment in Missoula, with instructions to leave Helena at 8 a.m. He arrives in Missoula at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Helena at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of th particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call or like travel that is all in the day's work. All the time involved, however, need not be counted. Since, except for the special assignment the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.

(5) Travel that is all in the day's work. Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m. all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C.A. 10, 1944).

(6) Travel away from home community. Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working

hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sundays as well as on the other days. Regular meal period time is not counted. As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

(7) When private automobile is used in travel away from home community. If an employee is offered public transportation but requests permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.

(8) Work performed while traveling. Any work which an employee is required to perform while traveling must of course be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405; Eff. 12/31/72.)

24.16.1011 ADJUSTING GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS (1) Adjusting grievances. Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

(2) Medical attention. Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

(3) Civic and charitable work. Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

(4) Suggestion systems. Generally time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on

the development of a suggestion, the time is considered hours worked. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.1012 RECORDING WORKING TIME

(1) Applicable regulations governing keeping of records. Section 39-3-403 MCA of the law authorizes the Commissioner to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment.

(2) Where records show insubstantial or insignificant periods of time. In recording working time under the law, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours working time or practically ascertainable periods of time he is regularly required to spend on duties assigned to him:

(3) Use of time clocks.

(a) Differences between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) "Rounding practices". It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employee's starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-404 & 405, MCA; Eff. 12/31/72.)

Sub-Chapters 11 and 12 Reserved

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Sub-Chapter 13

Individual Contractor

24.16.1301 INDIVIDUAL CONTRACTOR (IS HEREBY REPEALED) (History: 39-3-403 MCA; IMP, 39-3-404 and 39-3-405 MCA; Eff. 12/31/72; REP, 1996 MAR p. 1668, Eff. 7/1/96.)

24.16.1302 EMPLOYER-EMPLOYEE RELATIONSHIP (IS HEREBY REPEALED) (History: 39-3-403 MCA; IMP, 39-3-404 and 39-3-405 MCA; Eff. 12/31/72; REP, 1996 MAR p. 1668, Eff. 7/1/96.)

Sub-Chapter 14 reserved

NEXT PAGE IS 24-1035

Sub-Chapter 15

Determinations Under and Interpretations
of the Montana Minimum Wage and Overtime Compensation Act

24.16.1501 PURPOSE AND SCOPE (1) Section 39-3-402 MCA defines the term "wage" to include the "reasonable cost", as determined by the commissioner, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. Whenever so determined and when applicable and pertinent, the "fair value" of the facilities involved shall be includable as part of "wages". However, the cost of board, lodging, or other facilities shall not be included as part of "wages" if excluded therefrom by a bona fide collective bargaining agreement.

(2) This sub-chapter 15 contains any determinations made as to the "reasonable cost" and "fair value" of board, lodging, or other facilities having general application and describes the procedure whereby determinations having general or particular application may be made. The part also interprets generally the provisions of section 39-3-402 MCA.

(3) Whenever so determined, the cost of board, lodging, or other facilities shall not be included as a part of "wages" if excluded therefrom by a term of employment.

(4) "Term of Employment" means the agreement between the employer and employee as to conditions of employment when no bona fide collective bargaining agreement exists.

(5) The term "reasonable costs" as used in section 39-3-402 (7) MCA is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees. (History: Sec. 39-3-403, MCA; IMP; 39-3-402, MCA; Eff. 12/31/79.)

24.16.1502 BOARD, LODGING OR OTHER FACILITIES Section 39-3-402(7) applies to both of the following situations:

(1) Where board, lodging or other facilities are furnished in addition to a stipulated wage: and

(2) Where charges for board, lodging, or other facilities and deducted from a stipulated wage. This section, 39-3-402(7) MCA was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

(3) (a) The cost of furnishing "facilities" found by the commissioner to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(b) The following is a list of facilities found by the commissioner to be primarily for the benefit of convenience

of the employer. The list is intended to be illustrative rather than exclusive:

(i) Tools of the trade and other materials and services incidental to carrying on the employers business;

(ii) The cost of any construction by and for the employer;

(iii) The cost of uniforms and their laundering, where the nature of the business requires the employee to wear a uniform. (History: Sec. 39-3-403,MCA; IMP, 39-3-402,MCA; Eff. 12/31/72.)

24.16.1503 EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

(1) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of bona fide collective bargaining agreement applicable to the particular employee.

(2) A collective bargaining agreement shall be deemed to be "bona fide" when it is made with a labor organization which has been certified by the National Labor Relations Board, or which is the certified representative of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended, or the Montana Collective Bargaining for Public Employees Act, or the Montana Collective Bargaining for Nurses Act.

(3) Collective bargaining agreements made with representatives who have not been certified will be ruled on individually upon submission to the Commissioner. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-402,MCA; Eff. 12/31/72.)

24.16.1504 RELATION TO OTHER LAWS Various Federal, State, and local legislation requires the payment of wages in cash, prohibits or regulates the issuance of scrip, tokens, credit cards, "dope checks" or coupons, prevents or restricts payment or wages in services or facilities, controls company stores and commissaries, outlaws "kickbacks" restrains assignment and garnishment of wages, and generally governs the calculation of wages and the frequency and manner of paying them. Where such legislation is applicable, nothing in the regulations, or the interpretations announced by the Commissioner should be taken to override or nullify the provisions of these laws. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-402,MCA; Eff. 12/31/72.)

24.16.1505 DEFINING THE TERM "FURNISHED AS APPLIED TO BOARD, LODGING, OR OTHER FACILITIES (1) Section 39-3-402(7) MCA applies to both of the following situations:

(a) Where board, lodging, or other facilities are furnished in addition to a stipulated wage; and

(b) Where charges for board, lodging, or other facilities are deducted from a stipulated wage. The use of the word "furnishing" clearly indicates that this section was intended to apply to all facilities furnished by the employer

as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

(2) The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.

(3) The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

(4) "Other facilities"

(a) "Other facilities" as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees' housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable and the transportation is not an incident of and necessary to the employment.

(b) It should also be noted that the cost of furnishing "facilities" which are primarily for the benefit of convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" include: Safety caps, explosives, and miner's lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee, "dues" to chambers of commerce and other organizations used for example to repay subsidies given to the employer to locate his factory in a

particular community; transportation charges where such transportation is an incident of any necessary to the employment; charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-402, MCA; Eff. 12/31/72.)

24.16.1506 "REASONABLE COST"; "FAIR VALUE" (1) "Reasonable cost", does not include a profit to the employer or to any affiliated person. Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities they will normally be deemed "affiliated persons" within the meaning of the regulations: A spouse, child, parent, or other close relative of the employer; a partner, officer, or employee in the employer company or firm; a parent, subsidiary, or otherwise closely connected corporation; and a agent of the employer. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-402 MCA; Eff. 12/31/72.)

24.16.1507 "FREE AND CLEAR" PAYMENT; "KICKBACKS"

(1) Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear". The wage requirements of the Law will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-402,MCA; Eff. 12/31/72.)

24.16.1508 TIPS OR GRATUITIES (1) Tips are the employees to keep and may not be used by the employer to make up any part of the employees wage.

(2) General characteristics of tips. A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity.

(3) Payments which constitute tips. In addition to cash sums presented by customers which an employee keeps as his own, tips received by an employee include, amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee

pursuant to directions from credit customers who designate amounts to be added to their bills as tips. (History: 39-3-403, MCA; IMP, 39-3-402, MCA; Eff. 12/31/72.)

24.16.1509 PROCEDURE FOR DETERMINING MINIMUM WAGE

(1) Section 39-3-409, MCA (1989), provides that the commissioner shall adopt rules to establish, with one exception, a minimum rate of wage the same as that "provided under the federal Fair Labor Standards Act (29 U.S.C. 206(a)(1))". The exception, found at 39-3-409(2), MCA, provides that "the minimum wage rate for a business whose annual gross sales are $110,000 or less is $4 an hour".

(2) The value of tips received by an employee may not be used to meet Montana's minimum wage requirements.

(3) Section 6(a) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)) was amended November 17, 1989, to provide for a minimum wage not less than $3.35 an hour until March 31, 1990; not less than $3.80 an hour for the year beginning April 1, 1990; and not less than $4.25 an hour after March 31, 1991.

(4) Section 6(a) of the Fair Labor Standards Act (29 USC 206(a)(1)) was amended August 20, 1996, to provide for a minimum wage of not less than $4.75 an hour during the period October 1, 1996 through August 31, 1997, and of not less than $5.15 an hour starting September 1, 1997. (History: 39-3-403, MCA; IMP, 39-3-409, MCA; NEW, 1990 MAR p. 852, Eff. 4/27/90; AMD, 1991 MAR p. 2264, Eff. 11/28/91; AMD, 1996 MAR p. 2882, Eff. 10/25/96.)

24.16.1510 MINIMUM WAGE RATE (1) Up to and including March 31, 1990, Montana's minimum hourly wage rate shall be $3.35 an hour.

(2) From April 1, 1990 through March 31, 1991, Montana's minimum hourly wage rate shall be $3.80 an hour.

(3) From April 1, 1991 through April 25, 1991, Montana's minimum hourly wage rate shall be $4.00 an hour.

(4) From April 26, 1991 through September 30, 1996, Montana's minimum hourly wage rate for a business whose annual gross sales is greater than $110,000 shall be $4.25 an hour, not including tips.

(5) Effective April 26, 1991, and thereafter until further notice, Montana's minimum hourly wage rate for a business whose annual gross sales is $110,000 or less shall be $4.00 an hour, not including tips.

(6) Effective April 26, 1991, no training or new hire wage will be recognized in Montana.

(7) For work performed from October 1, 1996 through August 31, 1997, Montana's minimum hourly wage rate for a business whose annual gross sales is more than $110,000 is $4.75 an hour, not including tips.

(8) For work performed on or after September 1, 1997, Montana's minimum hourly wage rate for a business whose annual gross sales is more than $110,000 is $5.15 an hour, not including tips. (History: 39-3-403, MCA; IMP, 39-3-409, MCA; NEW, 1990 MAR p. 852, Eff. 4/27/90; AMD, 1991 MAR p. 2264, Eff. 11/28/91; AMD, 1996 MAR p. 2882, Eff. 10/25/96.)

Sub-Chapters 16 through 18 reserved

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Sub-Chapter 19

Investigations And Inspections

24.16.1901 INVESTIGATIONS AND INSPECTIONS (IS HEREBY REPEALED) (History: 39-3-403 MCA; IMP, 39-3-407 MCA; Eff. 12/31/72; REP, 1996 MAR p. 1668, Eff. 7/1/96.)

Sub-Chapter 20 reserved

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Sub-Chapter 21

Joint Employment Relationship

24.16.2101 JOINT EMPLOYMENT (1) A single individual may stand in the relation of an employee to two or more employers at the same time under the Montana Minimum Wage and Overtime Compensation Act, since there is nothing in the law which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employments for purposes of the law depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the law. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the law. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the law, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

(2) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(a) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees, or,

(b) Where one employer is acting directly or indirectly in the interest of the other employer (or other employers) in relation to the employee, or,

(c) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the

other employer. (History: Sec. 39-3-403,MCA; IMP, 39-3-402, MCA; Eff. 12/31/72.)

Sub-Chapter 22 Reserved

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Sub-Chapter 23

Regulations for Employment of Learners

24.16.2301 EMPLOYMENT OF LEARNERS (1) Applicability of regulations contained in this part are issued in accordance with section 39-3-406 MCA of the law to provide for the employment under special certificates of learners at wages lower than the minimum wage applicable under section 39-3-404 MCA. Such certificates shall be subject to the provisions hereinafter set forth and to such additional terms and conditions as may be established in supplemental regulations applicable to the employment of learners in particular industries.

(2) Definitions. As used in the regulations contained in this part:

(a) A "learner" is a worker whose total experience in an authorized learner occupation in the industry within the past three years, is less than the period of time allowed as a learning period for that occupation in a learner certificate issued pursuant to the regulations in this part.

(b) An "experienced worker" is a worker whose total experience is an authorized learner occupation in the industry within the past three years is at least equal to the period of time allowed as a learning period for that occupation in a learner certificate issued pursuant to the regulations in this part.

(3) Application for a learner certificate.

(a) Whenever the employment of learners at wages lower than the minimum wage applicable under section 39-3-404 MCA of the law, is believed necessary to prevent curtailment of opportunities for employment in a specified plant, an application for a certificate authorizing the employment of such learners at subminimum wage rates may be filed by the employer with the Commissioner of Labor or his representative.

(b) Application must be made on the official form furnished by these divisions and must contain all information required by such form, including among other things, information concerning efforts made by the applicant to obtain experienced workers, the occupations in which learners are to be employed, the number of learners previously hired, whether learners are actually available, the number of learners requested, their proposed hourly rates and learning periods in number of hours, the number of experienced workers in such occupations and their straight time average hourly earning during the last payroll period, the number of workers employed during previous periods, and the type of equipment to be used by learners. Any applicant may also submit each additional information as may be pertinent.

(c) Any application which fails to present the information required by the forms may be returned to the applicant with a notation to deficiencies and without prejudice against

submission of a new revised application.

(d) Separate application must be made with respect to each learner which the applicant desires to employ at subminimum wage rates.

(e) The number of trainees will be limited according to the total number of employees.

(f) Approval of the training program and the application for learner certificate must be obtained prior to the employment of a learner at subminimal wages.

(4) Procedure for action upon an application. Upon receipt of an application for a certificate, the Administrator or his authorized representative shall consider all of the relevant facts and, subject to the conditions specified in subsection (5) of ARM 24.16.2301, shall issue or deny a learner certificate. To the extent he deems appropriate, the administrator or his authorized representative may provide an opportunity to other interested persons to present data and views on the application prior to granting or denying a learner certificate.

(5) Conditions governing issuance of a learner certificate. The following conditions shall govern the issuance of a special certificate authorizing the employment of learners at subminimum wage rate:

(a) An adequate supply of qualified experienced workers is not available for employment; the experienced workers presently employed in the plant in occupations in which learners are requested are afforded an opportunity, to the fullest extent possible, for full-time employment; learners are available for employment; and the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) Reasonable efforts have been made to recruit experienced workers, including the placement of an order with the local State Employment Security Office not more than fifteen days prior to the date application. Written evidence from such office that the order has been placed shall be submitted by the employer with the application.

(c) The issuance of a learner certificate will not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry.

(d) Abnormal labor conditions such as a strike, a lockout, or other similar condition, do not exist at the plant for which a learner certificate is requested.

(e) There are no serious outstanding violations of the pro-visions of a learner certificate previously issued to the company, nor have there been any serious violations of the law which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

(f) The occupation or occupations in which learners are to receive training involve a sufficient degree of skill to

necessitate an appreciable training period.

(g) Learners shall be afforded every reasonable opportunity for continued employment upon completion of the training period.

(6) Terms and conditions of employment under learner certificates.

(a) A learner certificate, if issued, shall specify, among other things: the occupations in which learners may be employed; the subminimum wage rates permitted during the authorized learning period which must be at least 85% of the applicable minimum wage; the learning period for each authorized learner occupation; and the effective and expiration dates of the certificate.

(b) A learner certificate may be issued for a period not longer than 30 days.

(c) No learner certificate may be issued retroactively.

(d) No learners shall be hired under a learner certificate if, at the time the employment begins, experienced workers capable of equaling the performance of a worker of minimum acceptance skill are available for employment. Each time before hiring learners an order for experienced workers must be placed or be on active file with the local State Employment Security Office. Written evidence that an order has been placed or is on active file shall be maintained in the employer's records.

(e) No learner shall be hired under a learner certificate while abnormal labor conditions such as a strike, lockout, or other similar condition, exist in the plant.

(f) Except as otherwise specified in applicable supplemental industry regulations, the number of hours of previous employment must be deducted from the authorized learning period if within the past three years a learner has been employed in a given occupation and industry for less than the total number of hours authorized as a learning period. There shall also be deducted from the authorized learning period all such hours of employment or training in vocational training schools or similar training facilities.

(g) Under no circumstances will certificates be granted authorizing the employment of learners at subminimum wage rates as homeworkers, or in maintenance occupations such as watchman or porter, or in operations of a temporary or sporadic nature.

(h) No provision of any learner certificate shall excuse noncompliance with higher standards applicable to learners which may be established under any other State law or any Federal law, or trade union agreement.

(7) Employment records to be kept. In addition to other records required under the record-keeping regulations, the employer shall keep the following records specifically relating to learners employed at subminimum wage rates:

(a) Each worker employed as a learner under a learner certificate shall be designated as such on the payroll re-

cords kept by the employer. All such learners shall be listed together as a separate group on the payroll records, with such learners occupation being shown.

(b) The employer shall also obtain at the time of hiring and keep in his records a statement signed by each such learner showing all applicable experience which the learner may have had in the industry in which he is employed during the preceding three years, or as otherwise required in the applicable supplemental industry regulations. The statement shall contain the dates of such previous employment, names, and addresses of employers, the occupation or occupations in which the learner was engaged and the types of products upon which the learner worked. The statement shall also contain information concerning pertinent training in vocational training schools or similar training facilities, including the dates of such training and the identity of the vocational school or training facility. If the learner has had no applicable experience or pertinent training, a statement to that effect signed by the learner should likewise be kept in the employer's records.

(c) The employer shall maintain a file of all evidence and records, including any correspondence, pertaining to the filing or cancellation of job orders placed with the local State Employment Security Office.

(d) The records required in this section, including a copy of any special certificate issued, shall be kept and made available for inspection at all times for at least three years from the last effective date of the certificate. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-406,MCA; Eff. 12/31/72.)

Sub-Chapter 24 Reserved

Sub-Chapter 25

Overtime Compensation

24.16.2501 RELATION TO OTHER LAWS GENERALLY
Compliance with other applicable legislation does not excuse noncompliance with the Montana Minimum Wage Law. Where a higher minimum wage than that set in the Montana Minimum Wage Law is applicable to an employee by virtue of such other legislation, the regular rate of the employee as the term is used in the Montana Minimum Wage Law, cannot be lower than such applicable minimum, for the words "regular rate at which he is employed" as used in section 39-3-405 MCA must be construed to mean the regular rate at which he is lawfully employed. (History: Sec. 39-3-403,MCA; IMP, Sec 39-3-405,MCA; Eff. 12/31/72.)

24.15.2502 MAXIMUM NONOVERTIME HOURS As a general stand- ards, section 39-3-405 MCA provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less that the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Law, to which the pay requirements of section 39-3-404 MCA (minimum wage) but not those of section 39-4-405 MCA are applicable. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-404 & 405,MCA; Eff. 12/31/72.)

24.16.2503 APPLICATION OF OVERTIME PROVISION GENERALLY
Since there is no absolute limitation on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 39-3-405 MCA. The law does not require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the law are actually worked in the workweek, overtime compensation pursuant to section 39-3-405 MCA need not be paid. Nothing in the law, however, will relieve an employer of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday. (History: Sec 39-3-403,MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.2504 THE WORKWEEK AS THE BASIS FOR APPLYING

SECTION 39-3-403 MCA (1) If in any workweek an employee is covered by the Law and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed), and pay overtime compensation for each hour worked in excess of the maximum hours applicable under section 39-3-404 MCA of the Law. In the case of an employee employed jointly by two or more employers, all hours worked by the employee for such employers during the workweek must be totaled in determining the number of hours to be compensated in accordance with section 39-3-405 MCA.

(2) Each workweek stands alone. The Law takes a single workweek as its standards and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standards or swing shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2505 DETERMINING THE WORKWEEK (1) An employee's workweek is a fixed and regularly recurring period of 168 hours -seven consecutive 24 hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Montana Minimum Wage Law, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups or employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Law. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in subsections (1) and (2) of ARM 24.16.2531.

(2) There is no requirement in the Law that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Law will be

satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next day after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2506 through 24.16.2510 Reserved

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24.16.2511 GENERAL STANDARD FOR OVERTIME PAY

(1) The general overtime pay standards requires that overtime must be compensated at the rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under Section 39-3-404 MCA of the Law.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime must be computed at a rate not less than one and one-half times such higher rate. The Law also provides in section 39-3-405 MCA and section 39-3-406 MCA, certain partial and total exemptions from the application of section 39-3-405 MCA to certain employees and under certain conditions. (History: Sec. 39-3-403,MCA; IMP, 39-3-404, 405 & 406,MCA; Eff. 12/31/72.)

24.16.2512 THE REGULAR RATE (1) The "regular rate" of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract. The U.S. Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed - and "actual fact". The "regular rate" may be more than the minimum wage; it cannot be less. An employee's regular rate includes all payments made by the employer to or on behalf of that employee. "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

(2) The regular rate is an hourly rate. The "regular rate" under the Law is a rate per hour. The Law does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following subsections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standards used in these examples is 40 hours in a workweek.)

(a) Hourly rate employee.

(i) Earnings at hourly rate exclusively. If the employee is employed solely on the basis of a single hourly

rate, the hourly rate is his "regular rate". For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $2 hours rate will bring, for an employee who works 46 hours, a total weekly wage of $98 (46 hours at $2 plus 6 at $1). In other words, the employee is entitled to be paid an amount equal to $2 an hour for 40 hours and $3 an hour for the 6 hours of overtime, or a total of $98.

(ii) Hourly rate and bonus. If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $4.60, the regular hourly rate of pay is $2.10 an hour (46 hours at $2 yields $92; the addition of the $4.60 bonus makes a total of $96.60; thus total divided by 46 hours yields a rate of $2.10). The employee is then entitled to be paid a total wage of $102.90 for 46 hours (46 hours at $2.10 plus 6 hours at $1.05, or 40 hours at $2.10 plus 6 hours at $3.15).

(b) Pieceworker.

(i) Piece rates and supplements generally. When an employee is employed on a piece-rate basis, his regular rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the piece workers "regular rate" for that week. For his overtime work the pieceworker is entitled to be paid in addition to this total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $92.00 at piece rates for 46 hours of productive work and in addition has been compensated at $2.00 an hour for 4 hours of waiting time, his total compensation, $100.00, must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay - $2.00. For the 10 hours of overtime the employee is entitled to additional compensation of $10.00 (10 hours at $1.00). For the week's work he is thus entitled to a total of $110.00 (which is equivalent to 40 hours at $2.00 plus 10 overtime hours at $3.00).

(ii) Piece rates with minimum hourly guarantee. In some cases an employee is hired on a piece rate basis coupled with a minimum hourly guarantee. Where the total piece rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum

hourly guarantee which he was paid in his regular rate in that week. In the example just given, if the employee was guaranteed $2.10 an hour for productive working time, he would be paid $96.60 (46 X $2.10) for the 46 hours of productive work (instead of the $92.00 earned at piece rates). In a week in which no waiting time was involved, he would be owed an additional $1.05 (half time) for each of the 6 overtime hours worked, to bring his total compensation up to $102.90 (46 hours at $2.10 plus 6 hours at $1.05 or 40 hours at $2.10 plus 6 hours at $3.15). If he is paid at a different rate for waiting time, his regular rate is the weighted average of the 2 hourly rates, as discussed in subsection (f) of ARM 24.16.2512.

(c) Day rates and job rates. If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totalling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

(d) Salaried employees - general.

(i) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $105 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or $3.00 an hour, and when he works overtime he is entitled to receive $2 for each of the first 40 hours and $4.50 (one and one-half times $3.00) for each hour thereafter. If an employee is hired at a salary of $105 for a 40 hour week, his regular rate is $2.625 an hour.

(ii) Salary for period other than workweek. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $346.67, or a regular semimonthly salary of $173.34 for 40 hours a week, is thus found to be $2.00 per hour.

(e) Fixed salary for fluctuating hours.

(i) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a

workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Law if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(ii) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $100 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50 and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $2.50, $2.27, $2.00, and $2.08, respectively. Since the employee has already received straighttime compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $100.00; for the second week $104.42 ($100 plus 4 hours at $1.135, or 40 hours at $2.27 plus 4 hours at $3.405); for the third week $100 ($100 plus 10 hours at $1.00 or 40 hours at $2.00 plus 10 hours at $3.00); for the fourth week approximately $108.32 ($100 plus 8 hours at $1.04 or 40 hours at $2.083 plus 8 hours at $3.121).

(iii) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Law, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not

worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Law, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Law cannot be rested on any application of the fluctuating workweek overtime formula.

(f) Employees working at two or more rates. Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. (History: Sec. 39-3-403,MCA; IMP, 39-3-404 & 405,MCA; Eff. 12/31/72.)

24.16.2513 PAYMENTS OTHER THAN CASH Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. Where, for example, an employer furnishes lodging to his employees in addition to cash wages, the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined. (History: Sec. 39-3-403,MCA; IMP, 39-3-404 & 405, MCA; Eff. 12/31/72.)

24.16.2514 COMMISSION PAYMENTS - GENERAL (1) Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay

day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

(2) Commission paid on a workweek basis. When the commission is paid on a weekly basis, it is added to the employee's other regular earnings for that workweek, and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

(3) Deferred commission payments-general rules. If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate no less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional over-time compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

(4) Deferred commission payments not identifiable as earned in particular workweeks. If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

(a) Allocation of equal amounts to each week. Assume that the employee earned an equal amount of commission in each week of the commission computation period and computed any additional overtime compensation due on this amount. This may be done as follows:

(i) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of com-

mission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(ii) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction Overtime hours/Total hours X 2. A coefficient table available from the Division Administrator has been prepared which contains the approximate decimals for computing the extra half-time due. Examples:

(A) If there is a monthly commission payment of $41.60, the amount of commission allocable to a single week is $9.60 ($41.60 X 12 = $499.20 ÷ 52 = $9.60). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $9.60 by 48 gives the increase to the regular rate of $0.20. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $0.80. The $9.60 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table), to get the additional overtime pay due of $0.80.

(B) An employee received $38.40 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $9.60. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $0.44 for the first and third week ($9.60 divided by 44 = 0.22 divided by 2 = 0.11 X 4 overtime hours = $0.44), no extra compensation for the second week during which no overtime hours were worked, and $0.80 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) Allocation of equal amounts to each hour worked. If there are facts which make it inappropriate to assume equal commission earnings for each workweek as outlined in paragraph (a) of this section, assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period, and divide the amount of the commission payment by the number of hours worked in the period to obtain the amount of increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the

commission computation period, to get the amount of additional overtime compensation due for this period.

Example: An employee received commission of $19.20 for a commission computation period of 96 hours, including 16 overtime hours (i.e., two workweeks of 48 hours each). Dividing the $19.20 by 96 gives a $0.20 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due and additional $1.60 for the commission computation period, representing an additional $0.10 for each of the 16 overtime hours.

(5) Commission payments - delayed credits and debits. If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.2515 PAYMENTS THAT MAY BE EXCLUDED FROM THE "REGULAR RATE" (1) Provisions governing inclusion, exclusion, and crediting of particular payments. As used in this subsection, the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include -

(a) Sums paid as gifts, payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or depended on hours worked, production, or efficiency;

(b) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(c) Sums paid in recognition of services performed during a given period of either,

(i) Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or

(ii) The payments are made pursuant to a bona fide profitsharing plan or trust or bona fide thrift or savings

plan, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency.

(d) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(e) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee or in excess of the employee's normal working hours or regular working hours as the case may be;

(f) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(g) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement contract for work outside of the house established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek). (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.2516 EXTRA COMPENSATION PAID FOR OVERTIME (1) Over-time premiums - general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due. Moreover, this extra compensation may be credited towards the overtime payments required by the Law.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Law are discussed in detail in the subsections following.

(c) The extra compensation provided by these three types of payments may be credited toward overtime compensation due for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

(2) Premium pay for hours in excess of a daily or weekly standard.

(a) Hours in excess of 8 per day or statutory weekly standard. Many employment contracts provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. Under some contracts such overtime compensation is fixed at one and one-half times the base rate; under others the overtime rate may be greater or less than one and one-half times the base rate. If the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified as the weekly maximum, the extra premium compensation paid for the excess hours is excludable from the regular rate and may be credited toward statutory overtime payments. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) Hours in excess of normal or regular working hours. Similarly, where the employee's normal or regular daily or weekly working hours are greater or less than 8 hours and 40 hours respectively and his contract provides for the payment of premium rates for work in excess of such normal or regular hours or work for the day or week (such as 7 in a day or 35 in a week) the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited towards overtime compensation due under the Law.

(c) Premiums for excessive daily hours. If an employee whose maximum hours standard is 40 hours is hired at the rate of $3.00 an hour and receives, as overtime compensation under his contract, $3.50 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the over-time rate from the employee's regular rate and credit the total of the extra 50 cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $4.00 for hours in excess of 12 per day, the extra $1 payments could likewise by credited toward overtime compensation due under the Law. To qualify as overtime premiums, the daily overtime premium payments must be made for hours in excess of 7 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided

into a "straight time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate.

(d) Hours in excess of other statutory standard. Where payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.

(e) Premium pay for sixth or seventh day worked. Extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

(3) Premium pay for work on Saturdays, Sundays, and other "special days".

(a) Extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as "special days") may be treated as an overtime premium for the purposes of the Law. If the premium rate is less than time and one-half, the extra compensation provided by such rate must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due.

(b) "Special day" rate must be at least time and one-half to qualify as overtime premium: The premium rate must be at least "one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days". Where an employee is hired on the basis of a salary for a fixed workweek or at a single hourly rate of pay, the rate paid for work on "special days" must be at least time and one-half his regular hourly rate in order to qualify as overtime premium. If the employee is a pieceworker or if he works at more than one job for which different hourly or piece rates have been established and these are bona fide rates applicable to the work when performed during nonovertime hours, the extra compensation provided by a premium rate of at least one and one-half times either;

(i) the bona fide rate applicable to the type of job the employee performs on the "special days", or

(ii) the average hourly earnings in the week in question will qualify as an overtime premium under this section.

(c) Bona fide base rate required: The regulations author- izes such premiums paid for work on "special days" to be treated as overtime premiums only if they are actually based on a "rate established in good faith for like work performed in nonovertime hours on other days". This phrase is used for the purpose of distinguishing the bona fide

employment standards from fictitious schemes and artificial or evasive devices. Clearly, a rate which yields the employees less than time and one-half the minimum rate prescribed by the law would not be a rate established in good faith.

(d) Work on the specified "special days": To qualify as an overtime premium, the extra compensation must be paid for work on the specified days. The term "holiday" is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion. A day of rest arbitrarily granted to employees because of lack of work is not a "holiday" within the meaning of this section, nor is it a "regular day of rest". The term "regular day of rest" means a day on which the employee in accordance with his regular prearranged schedule is not expected to report for work. In some instances the "regular day of rest" occurs on the same day or days each week for a particular employee; in other cases, pursuant to a swing shift schedule, the scheduled day of rest rotates in a definite pattern, such as 6 days of work followed by 2 days of rest. In either case the extra compensation provided by a premium rate for work on such scheduled days of rest (if such rate is at least one and one-half times the bona fide rate established for like work during nonovertime hours on other days) may be treated as an overtime premium and thus need not be included in computing the employee's regular rate of pay and may be credited toward overtime payments due under the Law.

(e) Payments of premiums for work performed on the "special day". To qualify as an overtime premium, the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an over-time premium. (For examples distinguishing pay for work on a holiday from idle holiday pay). Thus a premium rate paid to an employee only when he received less than 24 hours notice that he is required to report for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay.

(4) "Clock pattern" premium pay.

(a) Where a collective bargaining agreement or other applicable employment contract in good faith establishes certain hours of the day as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum hours standard applicable under section 39-3-405 MCA and provides for the payment of a premium rate for work outside such hours), the extra compensation provided by such premium rate will be treated as an overtime premium if the premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for

like work performed during the basic, normal or regular workday or workweek.

(b) Premiums for hours outside established working hours. To qualify as an overtime premium the premium must be paid because the work was performed during hours "outside of the hours established * * * as the basic * * * workday or workweek" and not for some other reason. Thus, if the basic workday is established in good faith as the hours from 8 a.m. to 5 p.m. a premium of time and one-half paid for hours between 5 p.m. and 8 a.m. would qualify as an overtime premium. However, where the contract does not provide for the payment of a premium except for work between midnight and 6 a.m. the premium would not qualify under this section since it is not a premium paid for work outside the established workday but only for certain special hours outside the established workday, in most instances because they are undesirable hours. Similarly, where payments of premium rates for work are made after 5 p.m. only if the employee has not had a meal period or rest period, they are not regarded as overtime premiums; they are premiums paid because of undesirable working conditions.

(c) Payment in pursuance of agreement. Premiums of the type which are to be treated as overtime premiums must be paid, "in pursuance of an applicable employment contract or collective bargaining agreement," and the rates of pay and the daily and weekly work periods referred to must be established in good faith by such contract or agreement. Although as a general rule a collective bargaining agreement is a formal agreement which has been reduced to writing, an employment contract may be either written or oral. Where there is a written employment contract and the practices of the parties differ from its provisions, it must be determined whether the practices of the parties have modified the contract. If the practices of the parties have modified the written provisions of the contract, the provisions of the contract as modified by the practices of the parties will be a controlling factor in any determination. The determination as to the existence of the requisite provisions in an applicable oral employment contract will necessarily be based on all the facts, including those showing the terms of the oral contract and the actual employment and pay practices thereunder.

(5) Premiums for weekend and holiday work - example. Suppose an agreement of employment calls for the payment of $3.00 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of $2.00 for like work performed during nonovertime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours

worked in the workweek. Tuesday is a holiday. The payment of $128.00 to which the employee is entitled under the employment agreement will satisfy the requirements of the Law since the employer may properly exclude from the regular rate the extra $8.00 paid for work on Sunday and the extra $8.00 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

(6) Premiums for work outside basic workday or workweek examples. Where "clock pattern" premiums are paid may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employers and employees in the longshore and stevedoring industries. These agreements specify straight time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. Under one such agreement, for example, such workday and workweek are established as the first 6 hours of work, exclusive of mealtime, each day, Monday through Friday, between the hours of 8 a.m. and 5 p.m. Under another typical agreement, such workday and workweek are established as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m. Monday through Friday. Work outside such workday and workweek is paid for at premium rates not less than one and one-half times the bona fide straight time rates applicable to like work when performed during the basic, normal, or regular workday or workweek. The extra compensation provided by such premium rates will be excluded in computing the regular rate at which the employees so paid are employed and may be credited toward overtime compensation due under the Law. For example, if an employee is paid $2 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and $3 per hour for like work outside of such workday, the extra $1 will be excluded from the regular rate and may be credited to overtime pay due under the Law. Similarly, if the straight time rate established in good faith by the contract should be higher because of handling dangerous or obnoxious cargo, recognition of skill differentials, or similar reasons so as to be $3 an hour during the hours established as the basic or normal or regular workday or workweek, and a premium rate of $4.50 an hour is paid for the same work performed during other hours of the day or week, the extra $1.50 may be excluded from the regular rate of pay and may be credited toward overtime pay due under the Law. Similar principles are applicable where agreements following this general pattern exist in other industries.

(7) Other types of contract premium pay distinguished.

(a) Overtime premiums are those defined by the statute. The various types of contract premium rates which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate and credited toward statutory

overtime pay requirements have been described in subsections (1) through (6) of ARM 24.16.2516. The plain wording makes it clear that extra compensation provided by premium rates other than those described cannot be treated as overtime premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

(b) Nonovertime premiums. The Law requires the inclusion in the regular rate of such extra premiums as nightshift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour) and premiums paid for hazardous, arduous or dirty work. It also requires inclusion of any extra compensation which is paid as an incentive for the rapid performance of work, and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour. Lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer pays 8 hours pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours pay received by an employee who completes the job in 6 hours must be included in his regular rate. Similarly, where an employer pays for 8 hours at premium rates for a job performed during the overtime hours whether it is completed in 8 hours or less, no part of the premium paid qualifies as overtime premium. (History: Sec. 39-3-403,MCA; IMP, 39-3-405 MCA; Eff. 12/31/72.)

24.16.2517 BONUSES (1) Inclusions and exclusion of bonuses in computing the "regular rate". The regulations of the Law requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contri-butions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in following subsections. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee.

(2) Method of inclusion of bonus in regular rate.

(a) General rules. Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation in the bonus covers only one weekly pay period. The amount of the bonus is merely added

to the other earnings of the employee and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid to the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) Allocation of bonus where bonus earnings cannot be identified with particular workweeks. If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then by computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

(3) Percentage of total earnings as bonus. In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Law and no recomputation will be required. This is not true, however, where this form

of payment is used as a device to evade the overtime requirements of the Law rather than to provide actual overtime compensation.

(4) Discretionary bonuses.

(a) The regular rate shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly * * *". Such sums may not, however, be credited toward overtime compensation due under the Law. (b)

Discretionary character of excluded bonus. In order for a bonus to qualify for exclusion as a discretionary bonus the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate. Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) Promised bonuses not excluded. The bonus, to be excluded, must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular

rate of pay.

(5) Gifts, Christmas and special occasion bonuses.

(a) The term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a regard for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency * * *". Such sums may not, however, be credited toward overtime compensation due under the Law.

(b) Gift or similar payment. To qualify for exclusion the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) Application of exclusion. If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

(6) Profit-sharing, thrift, and savings plans. The term "regular rate" shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements set forth in appropriate regulations * * *". Such sums may not, however, be credited toward overtime compensation due under the Law. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in Sub-Chapter 5, of this chapter, will be properly excluded from the regular rate.

(7) Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) The term "regular rate" shall not be deemed to include: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for

providing old age, retirement, life, accident, or health insurance or similar benefits for employees * * *". Such sums may not, however, be credited toward overtime compensation due under the law. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2518 CONDITIONS FOR EXCLUSION OF BENEFIT PLAN CONTRIBUTIONS (1) General rules. In order for an employer's contribution to qualify for exclusion from the regular rate, the following conditions must be met:

(a) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(b) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness medical expenses, hospitalization, and the like.

(c) In the plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purpose of the plan or trust.

(iv) NOTE: The requirements in subsection (ii) and (iii) of this subsection for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(d) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon

trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Law may result if the employee contributions cut into the required minimum or overtime wages. Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employees contribu-tions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(e) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: Provided, however, that if a plan otherwise qualifies as a bona fide benefits plan, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit

(i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or

(ii) upon proper determination of the plan, or circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described.

(f) Plans under section 401(a) of the Internal Revenue Code. Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in subsections (a), (d), and (e) of paragraph (1) of this subsection. (History:

Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2519 PAYMENTS NOT FOR HOURS WORKED AND REIMBURSEMENT FOR EXPENSES (1) The term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *". However, since such payments are not made as compensation for the employee's hours worked in any workweek, no part of such payments can be credited toward overtime compensation due under the Law.

(2) Reimbursement for expenses.

(a) General rule. Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) Illustrations. Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(i) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(ii) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(iii) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(iv) "Supper money", a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(v) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred.

(A) because the employer has moved the plant to another town before the employee has had an opportunity to find

living quarters at the new location or

(B) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

(vi) Payments excluding expenses. It should be noted that only the actual or reasonably approximate amount of the expense is excludable from regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

(vii) Payments for expenses personal to the employee. The expenses for which reimbursement is made must, in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing) the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2520 PAY FOR CERTAIN IDLE HOURS

(1) General rules. Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Law.

(2) Limitations on exclusion. This provision deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays, in a particular plant, but this does not make them either "holiday" or "vacations", or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

(3) Failure to provide work. The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule, ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

(4) Other similar cause. The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category. (History: Sec. 39-3-403, MCA; IMP, 39-3-405,MCA; Eff. 12/31/72.)

24.16.2521 PAY FOR FOREGOING HOLIDAYS AND VACATIONS.

(1) Sums payable whether employee works or not. Certain payments made to an employee for periods during which he performs no work because of a holiday or vacation are not required to be included in the regular rate because they are not regarded as compensation for working. Suppose an employee who is entitled to such a paid idle holiday or paid vacation foregoes his holiday or vacation and performs work for the employer on the holiday or during the vacation period. If, under the terms of his employment, he is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate. It is still not regarded as compensation for hours of work if he is otherwise compensated at his customary rate (or at a higher rate) for his work on such days. Since it is not compensation for work it may not be credited toward overtime compensation due under the Law. Two examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(a) An employee whose rate of pay is $2 an hour and who usually works a 6 day 48 hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings - $96. He forgoes his vacation and works 50 hours in the week in question. He is owed $100 as his total straight time earnings for the week, and $96 in addition as his vacation pay. Under the statute he is owed an additional $10 as overtime premium (additional

half-time) for the 10 hours in excess of 40. His regular rate of $2 per hour has not been increased by virtue of the payment of $96 vacation pay, but no part of the $96 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to $96 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides $96 vacation pay.)

(b) An employee who is entitled under his employment contract to 8 hours pay at his rate of $2 an hour for the Christmas holiday, foregoes his holiday and works 9 hours on that day. During the entire week he works a total of 50 hours. He is paid under his contract, $100 as straight time compensation for 50 hours plus $16 as idle holiday pay. He is owed under the statute, an additional $10 hours in excess of 40. His regular rate of $2 per hour has not been increased by virtue of the holiday pay but no part of the $16 holiday pay may be credited toward statutory overtime compensation due.

(2) Premiums for holiday work distinguished. The example in paragraph (1) (b) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he foregoes his holiday also, under his contract, foregoes his idle holiday pay.

(a) The typical situation is one in which an employee is entitled by contract to 8 hours pay at his rate of $2 an hour for certain named holidays when no work is performed. If, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of $3 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, $27 (9 X $3) for the holiday work and $82 for the other 41 hours worked in the week, a total of $109. Under the statute (which does not require premium pay for a holiday) he is owed $110 for a workweek of 50 hours at a rate of $2 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of $1 to meet the statutory requirements.

(b) If all other conditions remained the same but the contract called for the payment of $4 (double time) for each

hour worked on the holiday, the employee would receive, under his contract, $36 (9 X $4) for the holiday work in addition to $82 for the other 41 hours worked, a total of $118. Since this holiday premium is also an overtime premium, it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Law. In distinguishing this situation from that in the example in paragraph (1) (b) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In example (b) the employee received a total of $34 attributable to the holiday: 8 hours' idle holiday pay at $2 an hour, due him whether he worked or not, and $18 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph the employee received $36 pay for working on the holiday - double time for 9 hours of work. Thus, clearly, all of the pay in this situation is paid for and directly related to the number of hours worked on the holiday. (History: Sec. 39-3-403, MCA; IMP, 39-3-405,MCA; Eff. 12/31/72.)

24.16.2522 "SHOW-UP" OR "REPORTING PAY"

(1) Applicable principles. Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work. The amounts that may be paid under such an agreement over and above what the employee would receive if paid at his customary rate only for the number of hours worked are paid to compensate the employee for the time wasted by him in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. One of the primary purposes of such an arrangement is to discourage employers from calling their men in to work for only a fraction of a day when they might get full-time work elsewhere. Pay arrangements of this kind are commonly referred to as "show-up" or "reporting" pay. That portion of such payment which represents compensation at the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or over-time compensation, as the case may be, in computing overtime compensation due under the law. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(2) Application illustrated. To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $2 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the $4 earned in the 2 hours of work on Monday but an extra 2 hours' "show-up" pay, or $4 by reason of this agreement. However, since this $4 in "show-up" pay is not regarded as compensation for hours worked, the employ-ee's regular rate remains $2 and the overtime requirement of the Law are satisfied if he receives, in addition to the $84 straight-time pay for 42 hours and the $4 "show-up" payment, the sum of $2 as extra compensation for the 2 hours of overtime work on Saturday. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.2523 "CALL-BACK" PAY (1) General. In the interest of simplicity and uniformity, the principles just discussed are applied also with respect to typical minimum "call-back" or "call-out" payments made pursuant to employment agreements. Typically, such minimum payments consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on infrequent and sporadic occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work.

(2) Application illustrated. The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of $2 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half or $9, under the call-back provision, in addition to $80 for working his regular schedule and $3 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Law, the 43 actual hours (not 44) are counted as working time during the week.

In addition to $86 pay at the $2 rate for all these hours, he has received under the agreement a premium of $1 for the 1 overtime hour on Monday and of $2 for the 2 hours of overtime work on the call, plus an extra sum of $3 paid by reason of the provision for minimum call-back pay. For purposes of the law, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of $3) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the law, but the extra $3 received under the call-back provision is not regarded as paid for hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Law. The regular rate of the employee, therefore, remains $2, and he has received an overtime premium of $1 an hour for 3 overtime hours of work. This satisfies the requirements of the law. The same would be true, of course, in the foregoing example, the employee was called back outside his scheduled hours for the 2 hour emergency job on another night of the week or on Saturday or Sunday instead of on Friday night.

(3) Other payments similar to "call-back" pay. The principles are also applied with respect to certain types of extra payments which are similar to call-back pay, such as:

(a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during outside of his regular work schedule; and

(b) Extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period". The extra payment, over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be) is considered as a payment that is not made for hours worked. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2524 PAY FOR NON-PRODUCTIVE HOURS DISTINGUISHED

(1) Under the law an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed work place and all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and

rest periods are regarded as working time and some are not. The governing principles are discussed in sub-chapter 10 of Chapter 16, "Hours worked". To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as "payments not for hours worked". Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Law, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one or a type of "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work, or other similar cause". For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of $2 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405, MCA; Eff. 12/31/72.)

24.16.2525 OTHER SIMILAR PAYMENTS

(1) General. The preceding sections have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided because they are not made as compensation for hours of work. Also excluded from the regular rate are "other similar payments to an employee which are not made as compensation for his hours of employment". Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in this part. It is clear that the clause was not intended to permit the exclusion from the regular rate of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(2) Examples of other excludable payments. A few

examples may serve to illustrate some of the types of payments intended to be excluded as "other similar payments":

(a) Sums paid to an employee for the rental of his truck or car.

(b) Loans or advances made by the employer to the employee.

(c) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2526 through 24.16.2530 Reserved

24.16.2531 CHANGE IN THE BEGINNING OF THE WORKWEEK

(1) Overlapping when change of workweek is made. As stated before, the beginning of the workweek may be changed for an employee or for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the Law. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the "old" workweek as previously constituted and the "new" workweek. Thus, if the workweek in the plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

(2) Computation of overtime due for overlapping workweeks.

(a) General rule. When the beginning of the workweek is changed, if the hours which "fall within" both "old" and "new" workweeks are hours in which the employee does no work, his statutory compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department as an enforcement policy, will assume that the overtime requirements of section 39-3-405 MCA of the Law have been satisfied if computation is made as follows:

(i) Assume first that the overlapping hours are to be counted as hours worked only in the "old" workweek and not in the new; compute straight time and overtime compensation due for each of the 2 workweeks on this basis and total the two sums.

(ii) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(iii) Pay the employee an amount no less than the greater of the amounts computed by methods (i) and (ii).

(b) Application of rule illustrated. Suppose that, in the example given, the employee, who receives $2 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 12, 1972. Suppose also that his last "old" workweek commenced at 7 a.m. on Monday, March 6, and he worked 40 hours March 6 through March 10, so that for the workweek ending March 12, he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the "new" workweek at 7 a.m. on March 12. If in the "new" workweek of Sunday, March 12, through Saturday, March 18, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13 day period. He should, therefore, be paid $95 (40 X $2 + 5 X $3) for the

period of March 6, through March 12, and $70 ($35 X $2) for the period of March 13, through March 18.

(c) Nonstatutory obligations unaffected. The fact that this method of compensation is permissible under the Montana Minimum Wage Law when the beginning of the workweek is changed will not alter any obligation the employer may have under his employment contract to pay a greater amount of overtime compensation for the period in question. (History: Sec. 39-3-403,MCA; IMP, Section 39-3-405,MCA; Eff. 12/31/72.)

24.16.2532 RETROACTIVE PAY INCREASES

(1) Where a retroactive pay increase is awarded to employees as a result of collective bargaining or otherwise, it operates to increase the regular rate of pay of the employees for the period of its retroactivity. Thus, if an employee is awarded a retroactive increase of 10 cents per hour, he is owed under the Law, a retroactive increase of 15 cents for each overtime hour he has worked during the period no matter what the agreement of the parties may be. A retroactive pay increase in the form of a lump sum for a particular period must be prorated back over the hours of the period to which it is allocable to determine the resultant increase in the regular rate, in precisely the same manner as a lump sum bonus. For a discussion of the method of allocating bonuses based on employment in a prior period to the workweeks covered by the bonus payment, see subsection (2) of section ARM 24.16.2517 (History: Sec. 39-5-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2533 HOW DEDUCTIONS AFFECT THE REGULAR RATE

(1) Amounts deducted from cash wages - general.

(a) The word "deduction" is often loosely used to cover reductions in pay resulting from several causes:

(i) Deductions to cover the cost to the employer of furnishing "board", lodging or other facilities.

(ii) Deductions for other items such as tools and uniforms which are not regarded as "facilities".

(iii) Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments).

(iv) Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.

(b) In general, where such deductions are made, the employee's "regular rate" is the same as it would have been if the occasion for the deduction had not arisen.

(2) Computation where particular types of deductions are made. The regular rate of pay of an employee whose earnings are subject to deductions of the types just described is determined by dividing his total compensation before deductions by the total hours worked in the workweek.

(3) Salary reductions in short workweeks.

(a) The reductions in pay described in subsection (a) (iv) of this section are not, properly speaking, "deductions" at all. If an employee is compensated at a fixed salary for a fixed work-week and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $80 for a 40-hour week, his hourly rate is $2. When he works only 36 hours he is therefore entitled to $72. The employer makes a "deduction" of $8 from his salary to achieve this result. The regular hourly rate is not altered.

(b) When an employee is paid a fixed salary for a workweek of variable hours, the understanding is that the salary or guarantee is due the employee in short workweeks as well as in longer ones and "deductions" of this type are not made. Therefore, in cases where the understanding of the parties is not clearly shown as to whether a fixed salary is intended to cover a fixed or a variable workweek the practice of making "deductions" from the salary for hours not worked in short weeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2534 through 24.16.2540 Reserved

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24.16.2541 THE OVERTIME RATE IS AN HOURLY RATE (1) Section 39-3-405 MCA requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium, the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour.

(2) To qualify under section 39-3-405 MCA, the overtime rate may not be less than one and one-half times the bona fide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one- half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate (for example, if the nonovertime rate is $2 per hour, the overtime rate may not be less than $3 but may be set at a higher arbitrary figure such as $3.20 per hour). (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2542 FIXED SUM FOR VARYING AMOUNTS OF OVERTIME

(1) A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per-hour basis. For example, an agreement that provides for the payment of a flat sum of $30 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $2 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $30 or time and one-half the employee's regular rate for all hours worked on Sunday, which ever is greater, the $30 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The Legislative purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason, where extra compensation

is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2543 FLAT RATE FOR SPECIAL JOB PERFORMED IN OVERTIME HOURS (1) Flat rate is not an overtime premium. The same reasoning applies where employees are paid a flat rate for a special job performed during overtime hours, without regard to the time actually consumed in performance. (This situation should be distinguished from "show-up" and "call-back" pay situations. The total amount paid must be included in the regular rate; no part of the amount may be credited toward statutory overtime compensation due.

(a) Application of the rule illustrated. It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(i) An employment agreement calls for the payment of $2 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of $3 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours' pay at the rate of $3 per hour (a total payment of $18) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(ii) Suppose an employee under such an agreement works the following schedule:

	M	T	W	T	F	S	S
Hours within basic workday ----------	8	8	7	8	8	0	0
Pay under contract--	$16	$16	$14	$16	$16	0	0
Hours outside basic workday ----------	2	*2	1	0	0	4	0
Pay under contract--	$6	$18	$3	0	0	$12	0

*Hours spent in the performance of special work.

(iii) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, as discussed in subsection (6) of ARM 24.16.2516. The $6 paid on Monday, the $3 paid on Wednesday and the $12 paid on Saturday are paid pursuant to rates which qualify as premium rates under the Law. The total extra

compensation (over the straight time pay for these hours) provided by these premium rates is $7. The sum of $7 should be subtracted from the total of $117 due the employee under the employment agreement. No part of the $18 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $110 must thus be divided by 48 hours to determine the regular rate - $2.29 per hour. The employee is owed an additional one-half this rate under the Law for each of 8 overtime hours worked - $9.16. The extra compensation in the amount of $7 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $9.16 owed as statutory overtime premiums. No part of the $18 payment may be so credited. The employer must pay the employee an additional $2.16 as statutory overtime pay - a total of $119.16 for the week. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2544 PAYMENT FOR ALL HOURS WORKED IN OVERTIME WORKWEEK IS REQUIRED (1) In determining the number of hours for which overtime compensation is due, all hours worked by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Law cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2545 AGREEMENTS OR PRACTICES IN CONFLICT WITH STATUTORY REQUIREMENTS ARE INEFFECTIVE (1) While it is permiss-ible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Law that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked. Since a lower rate cannot lawfully be set for overtime hours it is obvious that the parties cannot lawfully agree that the working time will not be paid for at all. An agreement that only the first 8 hours of work on any days or only the hours worked between certain fixed hours of the day or only the first 40 hours of any week will be counted as working time will clearly fail of its evasive purpose. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee's right to compensation for work which he is actually suffered

or permitted to perform.

(2) An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $2 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $3 an hour for the hours in excess of 40 would not meet the overtime requirements of the law. Under the principles set forth, the employee would have to be paid $10 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the law. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2544 through 24.16.2550 Reserved

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24.16.2551 PRODUCTIVE AND NONPRODUCTIVE HOURS OF WORK

(1) Failure to pay for nonproductive time worked. Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the law; such nonproductive working hours must be counted and paid for.

(2) Compensation payable for nonproductive hours worked. The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all the first 40 hours and at a rate not less than one and one-half times this rate for all hours in excess of 40. In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(3) Compensation attributed to both productive and nonproductive hours. The situation described in paragraph (1) of this subsection is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in down-time (waiting for work) will not be paid for or will neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable minimum hours standard. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72)

24.16.2552 PAYING FOR BUT NOT COUNTING HOURS WORKED (1) In some contracts provision is made for payment for certain hours, which constitute working time under the law, coupled with a provision that these hours will not be counted as working time. Such a provision is a nullity.

If the hours in question are hours worked, they must be counted as such in determining whether more than the applicable maximum hours have been worked in the workweek. If more hours have been worked, the employee must be paid overtime compensation at not less than one and one-half times his regular rate for all overtime hours. A provision that certain hours will be compensated only at straight time rates is likewise invalid. If the hours are actually hours worked in excess of the applicable maximum hours standard, extra halftime compensation will be due regardless of any agreement to the contrary. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2553 DECREASE IN HOURS WITHOUT DECREASING PAY GENERAL

(1) Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased. (History: Sec. 39-3-403, MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2554 REDUCING THE FIXED WORKWEEK FOR WHICH A SALARY IS PAID (1) If an employee whose maximum hours standard is 40 hours was hired at a salary of $80 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $2 per hour. If his workweek is later reduced to a fixed workweek of 35 hours to earn $80, so that he earns his salary at the average rate of $2.29 per hour. His regular rate thus becomes $2.29 per hour; it is no longer $2 an hour. Overtime pay is due under the law only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of $80 now covers 35 hours of work and no more, the employee would be owed $2.29 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times $2.29 ($3.44) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 39-3-404 requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive $2.29 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid.

Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours - $80, 5 hours pay at $2.29 per hour for the 5 hours between 35 and 40 - $11.45, and one hour's pay at $3.44 for the one hour in excess of 40 - $3.44, or a total of $94.89 for the week.

(2) Effect if salary is for variable workweek. The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek of up to 40 hours. If this is the new agreement, the employee receives $80 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is $2 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains $3 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 to 30 hours. No deductions for hours not worked in short workweeks would be made.

(3) Effect on hourly rate employees. A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly basis to a fixed salary for a variable workweek up to 40 hours, the results described in subsection (2) of ARM 24.16.2554 follow:

(4) Effect on salary covering more than 40 hours' pay. The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $110 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $1 per hour (half-time) in addition to his salary, and to statutory overtime pay of $3 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or

less, his regular rate in any overtime week of 55 hours or less is determined by dividing his salary by the number of hours worked to earn it in that particular week, and additional half- time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $2 per hour and he is due, in addition to his salary, extra compensation of $1 for each hour over 40 but not over 55 and full time and one-half, or $3, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $2.20 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $2.20 per hour for the hours not worked. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2555 REDUCTION OF REGULAR OVERTIME WORKWEEK WITHOUT REDUCTION OF TAKE HOME PAY. (1) The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earning at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $2 an hour and regularly worked 50 hours, earning $110 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $2 per hour to $2.32 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $110.20.

(2) Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate of $3 per hour for all workweeks in which the employee worked 40 hours or less, approximately $2.93 per hour for workweeks of 41 hours, approximately $2.85 for workweeks of 42 hours, approximately $2.40 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") $3 an hour regardless of the number of overtime hours worked. This is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with the law. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonover-

time week - in this case $3 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide $2 rate usually working 50 hours and taking home $110 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to $2.50 for such weeks so that their total compensation is $107.50 for a 42 - hour week the question may properly be asked, when they return to the 50 - hour week, the $2 rate and the gross pay of $110 whether the $2 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra $2.50 or is their "regular" rate really now $2.50 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee - the longer he works the lower the rate - the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

(3) Plan for gradual permanent reduction in schedule. In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from say, 48 hours, an agreement is entered into with a view to lessening the shock caused by the expected reduction in take-home wages. The agreement may provide for a rising scale of rates as the workweek is gradually reduced. The varying rates established by such agreement will be recognized as bona fide in the weeks in which they are respectively operative provided that,

(a) The plan is bona fide and there is no effort made to evade the overtime requirements of the Law;

(b) There is a clear downward trend in the duration of the workweek throughout the period of the plan even though fluctuations from week-to-week in accordance with the number of hours which any particular employee or group happens to work. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

24.16.2556 ALTERNATING WORKWEEKS OF DIFFERENT FIXED LENGTHS (1) In some cases an employee is hired on a salary basis with the understanding that his weekly salary is intended to cover the fixed schedule of hours (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. For example, many offices operate with half staff on Saturdays and, in consequence, employees are hired at a fixed salary covering a fixed working schedule of 7 hours a day Monday through Friday and 5 hours on alternate Saturdays. The parties agree that extra compensation is to be paid for all hours worked in excess of the schedule in either week, at the base rate for hours between 35 and 40 in the short week and at time and one-half such

rate for hours in excess of 40 in all weeks. Such an arrangement results in employee's working at two different rates of pay - one thirty-fifth of the salary in short workweeks and one-fortieth of the salary in the longer weeks. If the provisions of such a contract are followed, if the nonovertime hours are compensated in full at the applicable regular rate in each week and overtime compensation is properly computed for hours in excess of 40 at time and one-half the rate applicable in the particular workweek, the overtime requirements of the Montana Minimum Wage Law will be met. While this situation bears some resemblance to the one discussed in subsection (2) of ARM 24.16.2555 there is this significant difference; the arrangement is permanent, the length of the respective workweeks and the rates for such weeks are fixed on a permanent schedule basis far in advance and are therefore not subject to the control of the employer and do not vary with the fluctuations in business. In an arrangement of this kind, if the employer required the employee to work on Saturday in a week in which he was scheduled for work only on the Monday through Friday schedule, he would be paid at his regular rate for all the Saturday hours in addition to his salary. (History: Sec. 39-3-403,MCA; IMP, Section 39-3-405,MCA; Eff. 12/31/72.)

24.16.2557 PRIZES AS BONUSES (1) Prizes or contest awards generally. All compensation paid by or on behalf of an employer to an employee as remuneration for employment must be included in the regular rate, whether paid in the form of cash or otherwise. Prizes are therefore included in the regular rate if they are paid to an employee as remuneration for employment. If therefore, it is asserted that a particular prize is not to be included in the regular rate, it must be shown either that the prize was not paid to the employee for employment, or that it is not a thing of value which is part of wages.

(2) Awards for performance on the job. Where a prize is awarded for the quality, quantity or efficiency of work done by the employee during his customary working hours at his normal assigned tasks (whether on the employer's premises or elsewhere) it is obviously paid as additional remuneration for employment. Thus prizes paid for cooperation, courtesy, efficiency, highest production, best attendance, best quality of work, greatest number of overtime hours worked, etc., are part of the regular rate of pay. If the prize is paid in cash, the amount paid must be allocated over the period during which it was earned to determine the resultant increase in the average hourly rate for each week of the period. If the prize is merchandise the cost to the employer is the sum which must be allocated. Where the prize is either cash or merchandise, with the choice left the employee, the amount to be allocated is the amount (or the cost) of the actual prize he accepts.

(3) Awards for activities not normally part of employee's job.

(a) Where the prize is awarded for activities outside the customary working hours of the employee, beyond the scope of his customary duties or away from the employer's premises, the question of whether the compensation is remuneration for employment will depend on such factors as the amount of time, if any, spent by the employee in competing, the relationship between the contest activities and the usual work of the employee, whether the competition involves work usually performed by other employees for employers, whether an employee is specifically urged to participate or led to believe that he will not merit promotion or advancement unless he participates.

(b) By way of example, a prize paid for work performed in obtaining new business for an employer would be regarded as remuneration for employment. Although the duties of the employees who participate in the contest may not normally encompass this type of work, it is work of a kind normally performed by salesmen for their employers, and the time spent by the employee in competing for such a prize (whether successfully or not) is working time and must be counted as such in determining overtime compensation due. On the other hand a prize or bonus paid to an employee when a sale is made by the company's sales representative to a person whom he recommended as a good sales prospect would not be regarded as compensation for services if in fact the prize-winner performed no work in securing the name of the sales prospect and spent no time on the matter for the company in any way.

(4) Suggestion system awards. The question has been raised whether awards made to employees for suggestions submitted under a suggestion system plan are to be regarded as part of the regular rate. There is no hard and fast rule on this point as the term "suggestion system" has been used to describe a variety of widely differing plans. It may be generally stated, however, that prizes paid pursuant to a bona fide suggestion system plan may be excluded from the regular rate at least in situations where it is the fact that:

(a) The amount of the prize has no relation to the earnings of the employee at his job but is rather geared to the value to the company of the suggestion which is submitted; and

(b) The prize represents a bona fide award for a suggestion which is the result of additional effort or ingenuity unrelated to and outside the scope of the usual and customary duties of any employee of the class eligible to participate and the prize is not used as a substitute for wages; and

(c) No employee is required or specifically urged to participate in the suggestion system plan or led to believe that he will not merit promotion or advancement (or retention of his existing job) unless he submits suggestions; and

(d) The invitation to employees to submit suggestions

is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on or develop; and

(e) There is no time limit during which suggestions must be submitted; and

(f) The employer has, prior to the submission of the suggestion by an employee, no notice or knowledge of the fact that an employee is working on the preparation of a suggestion under circumstances indicating that the company approved the task and the schedule of work undertaken by the employee. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2558 through 24.16.2570 Reserved

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24.16.2571 DEVICES TO EVADE THE OVERTIME REQUIREMENTS (1) Artificial regular rates.

(a) Since the term "regular rate" is defined to include all remuneration for employment (except statutory exclusions) whether derived from hourly rates, piece rates, production bonuses or other sources, the overtime provisions of the law cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means. The established hourly rate is the "regular rate" to an employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial "regular" rate will not result in compliance with the overtime provisions of the Law.

(b) It may be helpful to describe a few schemes that have been attempted and to indicate the pitfalls inherent in the adoption of such schemes. The device of the varying rate which decreases as the length of the workweek increases has already been discussed. It might be well, however, to reemphasize that the hourly rate paid for the identical work during the hours in excess of the applicable maximum hours standard cannot be lower than the rate paid for the nonovertime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. It has been pointed out that it is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

(c) Where the employee is hired at a low hourly rate supplemented by facilities furnished by the employer, other than those specifically excluded, commissions, pay ostensibly (but not actually) made for idle hours, or the like, his regular rate is not the hourly rate but is the rate determined by dividing his total compensation from all these sources in any workweek by the number of hours worked in the week. Payment of overtime compensation based on the hourly rate alone in such a situation would not meet the overtime requirements of the Law.

(d) One scheme to evade the full penalty of the Law was that of setting an arbitrary low hourly rate upon which overtime compensation at time and one-half would be computed for all hours worked in excess of the applicable maximum hours standard; coupled with this arrangement was a guarantee that if the employee's straight time and overtime compensation, based on this rate, fell short, in any week, of the compensation that would be due on a piece-rate basis of x cents per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it

never (or seldom) was operative.

(e) The scheme is no better if the employer agrees to pay straight time and overtime compensation on the arbitrary hourly rates and to make up the difference between this total sum and the piece-rate total in the form of a bonus to each employee.

(2) The "split-day" plan.

(a) Another device designed to evade the overtime requirements of the Law was a plan known as the "Poxon" or "split-day" plan. Under this plan the normal or regular workday is artificially divided into two portions, one of which is arbitrarily labeled the "straight-time" portion of the day and the other the "overtime" portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as the regular rate; "time and one-half" based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $2 per hour under a contract which provides for the payment of so-called "overtime" for all hours in excess of 4 per day. Thus, for the normal or regular 8 hour day the employee would receive $8 for the first 4 hours and $12 for the remaining 4 hours; and a total of $20 for 8 hours. (This is exactly what he would receive at the straight time rate of $2.50 per hour.) On the sixth 8-hour day the employee likewise receives $20 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at "over-time" rates for 20 hours of the workweek.

(b) Such a division of the normal 8 hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of $2 an hour and the alleged overtime rate of $3 per hour is not paid for overtime work. It is not geared either to hours "in excess of the employee's normal working hours or regular working hours", or for work "outside of the hours established in good faith * * * as the basic, normal or regular workday", and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is $2.50 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard.

(3) Artificially labeling part of the regular wages a "bonus".

(a) The term "bonus" is properly applied to a sum which is paid as an addition to total wages, usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the

employee is entitled to receive under his regular wage contract.

(b) For example, if an employer has agreed to pay an employee $125 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the $125 salary by the number of hours worked in week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same $125 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of $2.00 an hour, overtime compensation at $3.00 per hour and labels the balance a "bonus" (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this "bonus" by prorating it back over the hours of the workweek. Overtime compensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(i) In the first week the employee whose applicable maximum hours standard is 40 hours works 40 hours and receives $125. The books show he has received $80 (40 hours X $2.00 an hour) as wages and $45 as bonus. No overtime has been worked so no overtime compensation is due.

(ii) In the second week he works 45 hours and receives $125. The books show he has received $80 for the first 40 hours and $15 (5 hours X $3.00 an hour) for the 5 hours over 40, or a total of $95 as wages, and the balance as a bonus of $30. Overtime compensation is then computed by the employer by dividing $30 by 45 hours to discover the average hourly increase resulting from the bonus - 66 2/3 cents per hour - and half this rate is paid for the 5 overtime hours - $1.67. This is improper. The employee's regular rate in this week is $2.78 per hour. He is owed $131.83, not $126.67.

(iii) In the third week the employee works 50 hours and is paid $125. The books show that the employee received $80 for the first 40 hours and $30 (10 hours X $3.00 per hour) for the 10 hours over 40, or a total of $110, and the balance as a bonus of $15. Overtime pay due on the "bonus" is found to be $1.50. This is improper. The employee's regular rate in this week is $2.50 and he is owed $137.50, not $126.50.

(d) Similar schemes have been devised for piece-rate employees. The method is the same. An employee is assigned an arbitrary hourly rate (usually the minimum) and it is agreed that his straight-time and overtime earnings will be computed on this rate but that if these earnings do not amount to the sum he would have earned had his earnings been computed on a piece-rate basis of "x" cents per piece, he will be paid the difference as a "bonus". The subterfuge

does not serve to conceal the fact that this employee is actually compensated on a piece-rate basis, that there is no bonus and his regular rate is the quotient of piece-rate earnings divided by hours worked.

(e) The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply.

(4) PSUEDO "percentage bonuses".

(a) (i) The device does not improve when it becomes more complex. If no true bonus in a flat sum amount can be legitimately separated out of the employee's wages, certainly no bonus in the form of a percentage of total earnings can be so derived. Yet some employers, seeking to evade the overtime requirements of the Law entirely while apparently complying with every requirement, have devised schemes of this kind. Such an employer pays his employee $125 a week without regard to the number of hours worked. He sets up a fictitious regular rate of $2.00 an hour. In a week in which the employee whose applicable maximum hours standard is 40 hours works 48 hours, his records show the following:

(The material in brackets does not usually appear in the final records.)

Straight time for 40 hours at $2.00 an hour ---	$80.00
Overtime for 8 hours at $3.00 an hour ---------	$24.00
	$104.00
($125-$104 = $21.00, total amount to be distributed as a bonus.) ($21.00/$104.00 = 20.2%)	
Percentage of total earnings bonus at 20.2% of	$104.00
----------	$ 21.00
Total ----------	$125.00

(ii) Obviously, this employee can no more be said to be receiving proper overtime than the employee in the examples already discussed. This employee's regular rate in this week is $2.60 per hour and he is owed a total of $135.20 for the week.

(b) (i) No better claim of compliance can be made by an employer who arbitrarily pieces out a bonus from all or part of group wages. The scheme tends to be more complex, but the principle is the same and the same results follow.

(ii) One relatively simple example of such a scheme is the following: Two employees are hired as salesmen on an hourly-rate-plus-commission basis. Each is hired at the rate of $2 an hour for the first 40 hours and $3 an hour for overtime and in addition, is entitled to a share in the commissions earned by each at the rate of one percent of sales. In a given week one employee works 40 hours and the other works 50. Together they sell $1,900 worth of merchandise and are thus entitled to $19 as commissions. In order to avoid payment of overtime on the commissions, the employer decides to distribute the $19 in the form of a percentage of total earnings. The total wages of the two

employees are $190 in the particular week. The $19 commissions represent 10 percent of this figure. The employer therefore pays a 10 percent "bonus" to each employee on his total earnings. One receives $8 as bonus the other $11. The employer claims that no additional overtime is due because the "bonus" was a percentage of total earning and the percentage was determined before the amount due any individual employee had been determined.

(iii) If the commissions were a "bonus" at all, the method of distribution might be proper. But a bonus, as has been stated, is a sum paid in addition to regular wages and not as a part of such wages. The employees have contracted to work on a wage plus-group-commission basis. No extra pay over and above the contract wage is involved. As a regular part of their duties, the employees make sales and regularly receive a one percent commission on the amount of the sale. Moreover, since the employees are owed the commissions in an amount related only to the amount of total sales and without regard to the number of hours worked, no part of such commissions is paid as overtime compensation.

(c) (i) In the example just given the employer sought only to relieve himself of the burden of paying proper overtime on part of the wages. The example must grow more complex but the principle does not change when the employer seeks to relieve himself of the entire burden of overtime by a fictitious division of regular group wages into hourly earnings and "bonus". This scheme is usually tried with respect to employees who work solely on a group piece rate or group commission basis. For simplicity we will assume that the two employees in the previous example receive no base hourly rate but are working solely on a commission basis-11 percent of total sales. In order for the scheme to function the employer must provide a minimum hourly guarantee. A low rate such as $1.64 is the best suited to his purpose for it provides a greater leeway as to the number of hours that may be worked without the payment of any additional overtime compensation whatever. In a week in which the total sales amount to $1,558 the two employees are together entitled to $171.38 (11 percent). They will receive this amount regardless of the number of hours they have worked individually or collectively. If they work the same number of hours, each will get half-$85.69. This would be true whether the hours worked by each were 40, 43, or 48 hours. Only the bookkeeping is altered. If each works 40 hours the record will show for each:

Wages at $1.64 per hour	$65.60
Bonus	20.09
Total	$85.69

If each works 45 hours, the record will show:

Wages at $1.64 per hour for 40 hours --------	65.60
Overtime pay at $2.46 per hour for 5 hours --	12.30
Bonus at 10 percent of total earnings (10 percent of $77.90 ----------	7.79
Total	$85.69

(ii) The total amount earned by each employee is exactly the same in each of the 2 weeks because it is determined not by the hours he works nor by the established rate but only by two unrelated factors: the total amount of sales and the relation between his hours of work and those of the other employees; not the total hours worked by either or both but merely the ratio of the two.

(iii) This will become apparent if we look at a workweek in which one works 40 hours and the other 50. The books then read this way:

1st employee:

Wages at $1.64 per hour for 40 hours --------	$65.60
Bonus at 10 percent of total earnings -------	6.56
Total ----------	$72.16

2nd employee:

Wages at $1.64 per hour for 40 hours --------	65.60
Overtime pay at $2.46 per hour for 10 hours-	24.60
Bonus at 10 percent of total earnings (10% of 90.20) ----------	9.02
Total ----------	$99.22

(iv) Note that in each case, as long as the amount of sales remains constant, the two employees together earn $171.38 regardless of whether either works overtime, or both do, and regardless of the number of hours of overtime worked. The first employee worked 40 hours in the first week and receives $85.69, yet he received only $72.16 for a 40-hour week in the third week of the series. The only reason for this was that in the third week the other employee worked 10 hours of overtime for which someone had to pay. The employer had invented the scheme so that he, the employer, would not have to pay. The burden would devolve in part on the overtime worker himself. The latter worked 10 hours of overtime yet he received only $13.53 more than he received in a 40-hour week.

(v) The system is an ingenious bookkeeping device but obviously it must fail of its purpose. It is only a more elaborate method of claiming that a rate-whether a salary or a piece rate or a commission-somehow "includes" overtime even though it is paid regularly when no overtime is worked and without regard to the amount of overtime worked.

(d) The examples dealt with two employees. It is the same for 2 as for 1 or for 20. A "bonus" which is derived by subtraction of compensation, based on an assigned rate, from the total amount agreed to be paid to an employee or a group is not a bonus and cannot be treated as such.

(e) Regardless of bookkeeping devices, the regular rate

of pay of employees employed on group piece rates or commissions is determined first by ascertaining the total amount which is due a particular employee under the contract and then dividing this sum by the number of hours he worked in the week. Extra overtime compensation, at half the rate thus determined, is due for each hour in excess of the maximum hours standard applicable. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-405,MCA; Eff. 12/31/72.)

Rules 24.16.2572 through 24.16.2580 Reserved

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24.16.2581 VETERANS SUBSISTENCE ALLOWANCES (1) Subsistence allowances paid under Public Law 346 (commonly known as the G.I. bill of rights) to a veteran employed in on-the-job training program work may not be used to offset the wages to which he is entitled under the Montana Minimum Wage Law. The subsistence allowances provided by Public Law 346 for payment to veteran are not paid as compensation for services rendered to an employer nor are they intended as subsidy payments for each employer. In order to qualify as wages under either section of the law, sums paid to an employee must be paid by the employer. Since veterans subsistence allowances are not so paid, they may not be used to make up the minimum wage or overtime pay requirements of the Law nor are they included in the regular rate of pay under section 39-3-404 & 405 MCA. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-404 & 405,MCA; Eff. 12/31/72.)

Sub-Chapters 26 through 50 Reserved

Sub-Chapter 51

Payment Of Back Wages To Be Made Through
The Administrator

24.16.5101 PAYMENT OF BACK WAGES (IS HEREBY REPEALED) (History: 39-3-403 MCA; IMP, 39-3-201 et seq. MCA; Eff. 12/31/72; AMD, 1980 MAR p. 1602, Eff. 6/13/80; REP, 1996 MAR p. 1668, Eff. 7/1/96.)

Sub-Chapter 55

Requirements of a Bona Fide Profit Sharing Plan or Trust

24.16.5501 SCOPE OF REGULATIONS (1)(a) The regulations in this part set forth the requirements of a "bona fide profit- sharing plan or trust". In determining the total remuneration for employment which is required to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide profit-sharing plan or trust meeting the requirements set forth herein.

(b) The inclusion or exclusion from the regular rate of contributions made by an employer pursuant to any plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees (regardless of whether the plan or trust is financed out of profits) is governed by the requirements which are set forth in sub-chapter 38 on Overtime Compensation. However, where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing-profit sharing payments to employees, the profit-sharing payment may be excluded from the regular rate if they meet the requirements of the regulations in this part and the contributions made by the employer for providing the benefits may be excluded from the regular rate if they meet the tests set forth in subsections (6) and (7) of ARM 24.16.2517.

(2) Essential requirements for qualifications.

(a) A bona fide profit-sharing plan or trust is required to meet all the standards set forth in paragraphs (b) through (g) of this subsection and must not contain any of the disqualifying provisions set forth in subsection (3).

(b) The profit-sharing plan or trust constitutes a definite program or arrangment in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of such profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(c) All contributions by the employer to the fund or trust to be distributed to the employees are:

(i) Derived solely from profits of the employer's business, enterprise, establishment or plant as a whole, or an established branch or division of the business or enterprise which is recognized as such for general business purposes and for which profits are separately and regularly

calculated in accordance with accepted accounting practice; and

(ii) Made periodically, but not more frequently than is customary or consistent with accepted accounting practice to make periodic determinations of profit.

(d) Eligibility to share in profits extends:

(i) At least to all employees who are subject to the minimum wage and overtime provisions of the law, or to all such employees in an established part of the employer's business as described in paragraph (c) of this subsection: Provided, however, that such eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

(ii) To such classifications of employees as the employer may designate with the approval of the Administrator upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing. The administrator for a specified period in a place or places where notices to employees are customarily posted or at such other place or places designated by the Administrator, or he may require notice to be given in such other manner as he deems appropriate.

(e) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more of such factors as straight-time earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(f) An employee's total share determined in accordance with paragraph (e) of this section may not be diminished because of any other remuneration received by him.

(g) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust: Provided, however, that the right of an employee to receive his share is not made dependent upon his continuing in the employ of the employer after the period for which the determination of profits has been made.

(3) Disqualifying provisions. No plan or trust which contains any one of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust.

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales such as hours of work, production, efficiency, sales or savings in cost.

(4) Distinction between plan and trust. As used in this part:

(a) "Profit-sharing plan" means any such program or arrangement as qualifies hereunder which provides for the distribution by the employer to his employees of their respective shares of profits;

(b) "Profit-sharing trust" means any such program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares. (History: Sec. 39-3-403,MCA; IMP, Sec. 3-404 & 405,MCA; Eff. 12/31/72.)

Sub-Chapters 56 through 60 Reserved

NEXT PAGE IS 24-1161

Sub-Chapter 61

Records to be Kept by Employer

24.16.6101 FORM OF RECORDS (1) No particular order or forms of records is prescribed by the regulations in this part. However, every employer who is subject to any of the provisions of the Montana Minimum Wage Law, is required to maintain records containing the information and data required by the specific sections of this part.

(2) Scope of regulations.

(a) The regulations in this subsection contain the requirements applicable to all employers employing covered employees, including the general requirements relating to the posting of notices, the preservation and location of records, and similar general provisions. This subsection also contains the requirements applicable to employers of employees to whom the minimum wage provisions of section 39-3-404 MCA and the overtime pay provisions of section 39-3-405 MCA apply. (History: Sec. 39-3-403,MCA; IMP, Sec. 39-3-404 and 405,MCA; Eff. 12/31/72.)

24.16.6102 GENERAL REQUIREMENTS (1) Employees subject to minimum wage or minimum wage and overtime provisions; Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each and every employee to whom the wage and hour law apply:

(a) Name in full, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records. This shall be the same name as that used for Social Security record purposes,

(b) Home address, including zip code,

(c) Date of birth,

(d) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., or Miss),

(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishemnt will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

(f) Regular hourly rate of pay, and length of pay period,

(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" shall be any consecutive 24 hours),

(h) Total daily or weekly straight-time earnings or

wages,

(i) Total weekly overtime compensation,

(j) Total additions to or deductions from wages paid each pay period. Every employer making additions to or deductions from wages shall also maintain, in individual employee accounts, a record of the dates, amounts, and nature of the items which make up the total additions and deductions,

(k) Total wages paid each pay period,

(l) Date of payment and the pay period covered by payment. Such records will be preserved by the employer for three years,

(2) Bona fide executive, administrative, and professional employees as referred to in section 39-3-406(1),

(i) items required

(a) With respect to persons employed in a bona fide executive, administrative or professional capacity, employers shall maintain and preserve records containing all the information and data required by subsection (1) except subparagraphs (f) through (j) thereof, and, in addition thereto the basis on which wages are paid (this may be shown as "$435 mo."; "$215 wk."; or "on fee").

(3) Posting of notices. Every employer employing any employees who are not specifically exempt from both the minimum wage provisions and the overtime provisions of section 39-3-404 and 405 MCA, shall post and keep posted such notices pertaining to the applicability of the Law as shall be prescribed by the Wage and Hour section, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy on the way to or from their place of employment.

(4) Records to be preserved 3 years. Each employer shall preserve for at least 3 years:

(a) Payroll records. From the last date of entry, all those payroll or other records containing the employee information and data required under any of the applicable sections of this part, and

(b) Certificates, agreements, plans, notices, etc. From their last effective date, all written:

(i) Collective bargaining agreements, any amendments or additions thereto,

(ii) Plans, trusts, employment contracts,

(iii) Individual contracts or collective bargaining agreements. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement.

(c) Sales and purchase records. A record of

(i) Total dollar volume of sales or business, and

(d) Supplementary basic records: Each employer required to maintain records under this part shall preserve for a period of at least 3 years:

(i) Basic employment and earning records. From the date of last entry, all basic time and earnings cards or

sheets of the employer on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the individual employee's daily, weekly, or pay period amounts of work accomplished (for example, units produced) when those amounts determine in whole or in part the pay period earning or wages of those employees.

(ii) Wage rate tables. From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime excess computation and

(iii) Worktime schedules. From their last effective date, all schedules or tables of the employer which establish the hours and days of employemnt of individual employees or of separate work forces.

(e) Records of additions to or deductions from wages paid: Each employer who makes additions to or deductions from wages paid shall preserve for at least 3 years from the date of last entry:

(i) Those records of individual employee accounts referred to in subsection (l) (j).

(ii) All employee purchase orders, or assignments made by employees, all copies of addition or deduction statements furnished employees, and

(iii) All records used by the employer in determining the original cost, operating and maintenance cost and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

(5) Place for keeping records and their availability for inspection.

(a) Place of records. Each employer shall keep the records required by the regulations in this part safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment such records shall be made available within 72 hours following notice from the Administrator or his duly authorized and designated representative.

(b) Inspection of records. All records shall be open at any time to inspection and transcription by the Administrator or his duly authorized and designated representative.

(6) Computations and reports. Each employer required to maintain records under this part shall make such extension, recomputation, or transcription of his records and shall submit to the Wage and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in his records as the Administrator or his duly authorized and designated representative may request in writing.

(7) "Board, lodging, or other facilities" under section

39-3-402 (7) MCA.

(a) In addition to keeping other records required by the regulations in this part, an employer who makes deductions from the wages of his employees for "board, lodging, or other facilities" (as these terms are used in section 39-3-402 MCA) furnished to them by the employer or by an affiliated person, or who furnished such "board, lodging, or other facilities" to his employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility. Separate records of the cost of each facility furnished to an employee must be kept.

(b) Employers making deductions for meals or who furnish meals to their employees as an addition to wages shall maintain and preserve records that show the following for each meal served.

(i) Menu price (if the employer is operating a restaurant type operation).

(ii) Type of meal.

(iii) Cost of meals to employee.

(iv) Date meal was furnished.

(v) Total cost to employee for the meals each workweek.

(vi) Signature of the employee indicating the meal was actually consumed by the employee.

(8) Employees under more than one minimum hourly rate.

(a) Additional items required. An employer of any employees subject to different minimum wage rates of pay who elects to pay less than an amount arrived at by applying the highest applicable minimum rate for all hours worked in any workweek, shall, in addition to any employee information and data required to be kept with respect to them by any applicable section of the regulations in this part maintain and preserve payroll or other records containing the following information and data with respect to each of those employees:

(i) The minimum rate of pay required to be paid for each different type of employment in which each employee was engaged during the workweek.

(ii) The basis on which wages are paid for each such different type of employment (such as "$2 each hour"; "$16 a day"; "$80 week"; "2¢ per piece"; "$80 wk. plus 5 percent commission on sales over $800 wk."; etc.),

(iii) The piece rate, if any, for each operation on each type of goods upon which the employee has worked under each such different applicable minimum rate of pay and the number of pieces worked upon at such piece rates,

(iv) The total hours or fractions thereof worked that workweek by each such employee in employment covered by each such different applicable minimum rate, and

(v) The total wages due each such employee at straight time for the hours worked in each such different type of employment including any amounts earned in excess of the applicable minimum rate of pay.

(b) Records of workers whose work cannot be segregated.

The provisions of paragraph (a) of this subsection shall not be construed to affect in any way the records to be kept, or compensation to be paid employees whose activities cannot be segregated and who are therefore, not subject to different minimum rates of pay.

(9) Learners, apprentices, students, or handicapped workers employed under special certificates as provided in section 39-3-406 MCA.

(a) Items required. With respect to persons employed as learners, apprentices, messengers, or full time students employed outside of their school hours in any retail or service establishment or handicapped workers at special minimum hourly rates under special certificates pursuant to section 39-3-406 MCA, employers shall maintain and preserve records containing the same information and data required with respect to other employees employed in the same occupations,

(b) Segregation or designation on payroll and use of identifying symbol. In addition, each employer shall segregate on his payroll or pay records the names and required information and data with respect to those learners, apprentices, messengers (and handicapped workers and students), employed under Special Certificates. A symbol or letter shall also be placed before each such name on the payroll or pay records indicating that, that person is a "learner" "apprentice", "messenger", "student", or "handicapped worker", employed under a Special Certificate. (History: Sec. 39-3-403 MCA; IMP, Sec. 39-3-404 & 405 MCA; Eff. 12/31/72.)

Sub-Chapters 62 through 64 Reserved

NEXT PAGE IS 24-1169

Sub-Chapter 65

Seasonal, Amusement or Recreational

24.16.6501 SEASONAL AMUSEMENT OR RECREATIONAL (1) Definitions.

(a) Seasonal - Means seven (7) months or less.

(b) Student - One who is attending an accredited school, college or university and is employed on a part-time basis.

(c) Amusement or Recreation Establishment - Examples are the concessionairies at amusement parks, resorts and ski areas.

(d) Amusement or Recreational area - Example - National Parks, Ski areas, Vacation resort areas.

(e) Establishment - Refers to a "distinct physical place of business" rather than to an entire business or enterprise which may include several separate places of business.

(2) Seasonal Amusement or Recreational Establishment. An amusement or recreational establishment operating on a seasonal basis must comply with the provisions of Section 39-3-404 MCA, but may qualify as an exempt establishment from the $2.00 under Section 39-3-406. Section 39-3-404 MCA apply to any students employed by an amusement or recreational establishment.

For seasonal amusement or recreational establishments to be exempt from the minimum wage of $2.00 per hour specified in Section 39-3-404 MCA they must meet all three of the following requirements.

(a) The business or establishment in which the students are employed must be amusement or recreational.

(b) The employee must be a student in an accredited school.

(c) The operation of the establishment must be seasonal (seven (7) months or less).

(3) Seasonal Amusement or Recreational area. Employers of students in an amusement or recreational area may qualify for a partial exemption from the overtime provisions of section 39-3-405(3) MCA. This exemption will allow the employer to employ the student employees for 48 hours in each workweek. In workweeks longer than 48 hours the student employee shall receive compensation for employment in excess of 48 hours in a workweek at a rate of not less than one and one half times the hourly wage rate at which he was employed.

Establishments operating in an amusement or recreational area must meet all the following requirements in order to qualify for the partial exemption.

(a) Must be in amusement or recreational area.

(b) Employee must be student in an accredited school.

(c) The establishment must be seasonal (seven (7) months or less).

(d) Board and room must be furnished. (History: Sec.

39-3-403,MCA; IMP, Sec. 39-3-404, 405, & 406,MCA; Eff 12/31/72.)

Sub-Chapter 66 Reserved

NEXT PAGE IS 24-1173

Sub-Chapter 67
Student-Learners

24.16.6701 EMPLOYMENT OF STUDENT-LEARNERS (1) Applicability of the regulations contained in this part.

(a) The regulations contained in this part are issued in accordance with section 39-3-404 MCA to provide for the employment under special certificates of student-learners at wages lower than the minimum wage applicable under section 39-3-406 MCA. Such certificates shall be subject to the terms and conditions hereinafter set forth.

(2) As used in the regulations contained in this part.

(a) A "student-learner" is one who is attending an accredited school, college, or university and is employed on a part time basis, pursuant to a bona fide vocational program.

(b) A "bona fide vocational training program" is one authorized and approved by the Montana State Office of Superintendent of Public Instruction and provides for part time employment training which may be scheduled for a part of the work day or workweek for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instructions designed to teach technical knowledge and related industrial information given as a regular part of the student-learners course by an accredited school, college or university.

(3) Application for a special student-learner certificate.

(a) Whenever the employment of a student-learner at wages lower than the minimum wage applicable under section 39-3-404 MCA is believed necessary to prevent curtailment of opportunities for employment, an application for a special certificate authorizing the employment of such student-learner at subminimum wages shall be filed by the employer with the Commissioner of Labor.

(b) Application must be made on the official form furnished by these Divisions and must be signed by the employer, the appropriate school official and the student-learner. The application must contain all information required by such form, including among other things, a statement clearly outlining the vocational training program and showing, particularly the processes in which the student-learner will be engaged when in training on the job; a statement directly related to the job; the total number of workers employed in the establishment; the number and hourly wage rate of experienced workers employed in the occupation in which the student-learner is to be trained; the hourly wage rate or progressive wage schedule which the employer proposes to pay the student-learner; data regarding the age of the student-learner; the number of hours of employment training a week; the number of hours of school instruction a week; and a certification by the appropriate school official that the student named therein will be receiving instruction in an

accredited school, college or university and will be employed pursuant to a bona fide vocational training program, as defined in subsection (2) (b).

(4) Conditions governing issuance of special student-learner certificates. The following conditions must be satisfied before a special certificate may be issued authorising the employment of a student-learner at subminimum wages:

(a) Any training program under which the student-learner will be employed must be a bona fide vocational training program as defined in subsection (2) (b);

(b) The employment of the student-learner at subminimum wages authorized by the special certificate must be necessary to prevent curtailment of opportunities for employment;

(c) The student-learner must be at least 18 years of age if he is to be employed in any hazardous occupation;

(d) The occupation for which the student-learner is receiving preparatory training must require a sufficient degree of skill to necessitate a substantial learning period;

(e) The training must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations.

(f) The employment of a student-learner must not have the effect of displacing a worker in the establishment;

(g) The employment of the student-learners at subminimum wages must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable character;

(h) The occupational needs of the community or industry warrant the training of student-learners;

(i) There are no serious outstanding violations of the provisions of a student-learner certificate previously issued to the employer, or serious violations of any other provisions of the Montana Wage or Labor Laws by the employer which provide reasonable grounds to conclude that the terms of the certificate would not be complied with, if issued;

(j) The issuance of such a certificate would not tend to prevent the development of apprenticeship or would not impair established apprenticeship standards in the occupation of industry involved;

(k) The number of student-learners to be employed in one establishment must not be more than a small proportion of its work force.

(5) Terms and conditions of employment under special student-learner certificates.

(a) The special student-learner certificate, if issued, shall specify, among other things.

(i) the name of the student-learner,

(ii) the name and address of the employer,

(iii) the name of the school which provides the related school instruction,

(iv) the occupation in which the student is to be trained,

(v) the maximum number of hours of employment training in any one week at a specified subminimum wage rate or rates and,

(vi) the effective and expiration dates of the certificate.

(b) The special minimum wage rate shall be not less than 85 percentum of the applicable minimum under section 39-3-404 MCA.

(c) No special student-learner certificate may be issued retroactively.

(d) The number of hours of employment training at subminimum wages pursuant to a certificate shall not exceed four hours a day or 20 hours per week, except that authorization may be granted by the administrator or his authorized representative for a greater number of hours if found to be justified by extraordinary circumstances.

(e) When school is not in session on any school day, the student-learner may work a number of hours in addition to the weekly hours of employment training authorized by the certificate; Provided, however, that the total hours worked shall not exceed 8 hours on any such day. A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked on such day.

(f) During the school term, when school is not in session for the entire week, the student-learner may work at his employment training a number of hours in the week in addition to those authorized by the certificate: Provided, however, that the total hours shall not exceed 40 hours in any such week. A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked in such week.

(g) A special student-learner certificate shall not constitute authorization to pay a subminimum wage rate to a student-learner in any week in which he is employed for a number of hours in addition to the number authorized in the certificate, except as provided in paragraphs (d), (e) and (f) of this subsection.

(6) Employment records to be kept. In addition to any other records required under the record-keeping regulations the employer shall keep the following records specifically relating to student-learners employed at subminimum wage rates:

(a) Any worker employed as a student-learner shall be identified as such on the payroll records, with each student-learners occupation and rate of pay being shown;

(b) Notations should be made in the employer's records when additional hours are worked by reason of school not being in session as provided in subsection (5) (d), (e) and (f).

(c) The records required in this section, including a copy of any special certificate issued, shall be kept and made available for inspection at all times for at least three

years from the last effective date of the certificate.

(7) Duration of certificates. A special student-learner certificate may be issued for a period to be determined by the Commissioner of Labor. No certificate shall authorize employment training beyond the date of graduation or the end of the school year.

(8) Compliance with established standards. No provision of the regulations contained in this part, or of any certificate issued pursuant thereto, shall excuse noncompliance with higher standards applicable to student-learners which may be established under any other State law, or any Federal law, municipal ordinance or trade union agreement. (History: Sec. 39-3-403 MCA; IMP, Sec. 39-3-406 MCA; Eff. 12/31/72.)

Sub-Chapter 68 Reserved

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Sub-Chapter 69

Thrift or Savings Plan

24.16.6901 REQUIREMENTS OF A "BONA FIDE THRIFT OR SAVINGS PLAN" (1) Scope and effect of part.

(a) The regulations in this part set forth the requirements of a "bona fide thrift or savings plan". In determining the total remuneration for employment which requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, or with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulations in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations in subsections (6) and (7) of ARM 24.16.2517.

(2) Essential requirements of qualification.

(a) A "bona fide thrift or savings plan" is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in subsection (4).

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees; Provided, however, That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time

earnings or total earnings, base rate of pay, or length of service of the employee.

(3) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: Provided, however, that a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a "bona fide thrift or savings plan"; if

(a) The plan meets all the other standards of this section;

(b) The plan contains none of the disqualifying factors enumerated in subsection (4) of this section;

(c) The employer's contribution is based to a substantial degree upon retention of savings; and

(d) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(e) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: Provided, that no employee's share in accordance with the plan may be diminished because of any other remuneration received by him.

(4) Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours or work, production or efficiency. (History: Sec. 39-3-403,MCA; IMP, Section 39-3-402, MCA; Eff. 12/31/72.)

Sub-Chapters 70 through 74 Reserved

NEXT PAGE IS 24-1185

Sub-Chapter 75

Wage Claims

24.16.7501 PROCEDURE FOR FILING CLAIMS (IS HEREBY REPEALED) (History: Sec. 39-3-202 and 39-3-403 MCA; IMP, Sec. 39-3-211 MCA; Eff. 12/31/72; REP, 1994 MAR p. 1152, Eff. 5/1/94.)

24.16.7502 PROCESSING THE CLAIM (IS HEREBY REPEALED) (History: Sec. 39-3-202 and 39-3-403 MCA; IMP, Sec. 39-3-211 MCA; Eff. 12/31/72; REP, 1994 MAR p. 1152, Eff. 5/1/94.)

24.16.7503 PURPOSE (1) These rules are designed to define terms used in the wage and hour claims process, to establish procedures for administering claims and calculating statutory penalties and to provide for relief in the event a party does not receive an item sent to them by mail. (History: Sec. 39-3-202 and 39-3-403 MCA; IMP, Sec. 39-3-202 and 39-3-403 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7504 and 24.16.7505 reserved

24.16.7506 DEFINITIONS (1) "Adverse decision" means a decision by the department, a hearings officer or the board that is not favorable to the party who wishes to have the decision reviewed.

(2) "Board" means the board of personnel appeals, and has the same meaning as provided by 39-3-201, MCA.

(3) "Commissioner" means the commissioner of labor, and has the same meaning as provided by 39-3-201, MCA.

(4) "Day" means a calendar day.

(5) "Department" means the department of labor and industry, and has the same meaning as provided by 39-3-201, MCA.

(6) "Determination" means a decision by the department as to the merits of a claim, which states the amount of wages and penalty (if any) is owed by the employer to the employee.

(7) "Employ" has the same meaning as provided by 39-3-201, MCA.

(8) "Employee" has the same meaning as provided by 39-3-201, MCA.

(9) "Employer" has the same meaning as provided by 39-3-201, MCA.

(10) "Formal hearing" means a contested case, held by a department hearing officer, pursuant to Title 2, chapter 4, part 6, MCA.

(11) "Penalty" means the statutory penalty provided by 39-3-206, MCA, which is assessed by the department against the employer and which is paid to the employee in addition to the wages owed.

(12) "Redetermination" means an informal review by the department, based upon new or additional information supplied by a party who has received an adverse determination.

(13) "Wages" has the same meaning as provided by 39-3-201, MCA. (History: Sec. 39-3-202 and 39-3-403 MCA; IMP, Sec. 39-3-202 and 39-3-403 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7507 through 24.16.7510 reserved

24.16.7511 ACCRUAL OF CLAIMS UPON SEPARATION FROM EMPLOYMENT (1) Claims accrue in the manner specified by 39-3-205, MCA.

(2) For the purpose of construing 39-3-205, MCA, any reason that an employer gives when firing an employee constitutes firing the employee "for cause."

(3) For the purpose of construing 39-3-205, MCA, payment of wages is considered to be "immediate" if the wages are paid to the employee by the earlier of the close of business or 4 hours from the time the employee is notified that the employee has been discharged. Payment of wages is also considered to be "immediate" if the employer mails to the employee a check or money order for the wages, and the envelope containing the payment is postmarked the same day as the discharge. If payment is made by mail, however, and there is a dispute over when the payment was made, the employer bears the burden of proof to show that payment was timely mailed. Such proof may include, but is not limited to, a receipt issued by the United States postal service showing that the envelope addressed to the employee was mailed on that date. (History: Sec. 39-3-202 MCA; IMP, Sec. 39-3-205 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7512 and 24.16.7513 reserved

24.16.7514 COMPUTATION OF TIME PERIODS (1) In computing any period of time prescribed or allowed by these rules or any applicable statute, the day of the act, event, or default after which the designated time period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. A half holiday is not a holiday, but is considered as a regular day.

(2) For the purpose of these rules, an item sent to the department is timely if it is either postmarked or received by the department by not later than the last day of the time period.

(3) An item which does not have a postmark is considered received as of the date it is date-stamped by the department. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-202 and 39-3-403 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7515 and 24.16.7516 reserved

24.16.7517 FACSIMILE FILINGS (1) Any document required or allowed to be filed with the department may be filed by means of a telephonic facsimile communication device (fax).

(2) Filings with the department by facsimile are subject to the following conditions:

(a) a filing must conform with all applicable rules, except that only one copy of a document need be filed by facsimile even when multiple copies otherwise would be required;

(b) if a document is received after 5:00 p.m. mountain time, the date of filing of that document, for purposes of these rules, will be the date of the next regular work day; and

(c) the original document and any copies must be received by the department within 5 days of the facsimile transmittal or the filing will not be recognized as timely.

(3) The failure, malfunction, or unavailability of facsimile equipment does not excuse a party from the requirements of timely filing. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-202 and 39-3-403 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rule 24.16.7518 reserved

24.16.7519 WAGE COMPLAINTS AND INVESTIGATIONS (1) The employee wage complaint is one basis for enforcement of Montana's wage laws. Special forms are provided by the department for the purpose of filing wage complaints.

(2) When the department receives a complaint, it is analyzed to determine its validity and whether the employee is covered by the law. If accepted, the complaint is assigned to a compliance specialist who then contacts the named company or employer to commence the investigation.

(3) Investigations may occur even if no complaint is filed. The department may, on a spot check basis, inspect payroll and personnel records, and conduct interviews to ensure compliance with wage laws.

(4) If a substantial number of computations are needed to determine the amount of wages due, the department may request the employer to make the computations. The employer's computations are subject to department approval. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-209 and 39-3-210 MCA; NEW, 1996 MAR p. 1668, Eff. 7/1/96.)

24.16.7520 PROCEDURE FOR ISSUING WAGE CLAIM DETERMINATIONS REGARDING EMPLOYMENT STATUS, INCLUDING THAT OF INDEPENDENT CONTRACTOR (1) Disputes regarding the employment status of an individual for wage claim purposes, including whether that individual is acting as an independent contractor, are regulated by the provisions contained in ARM Title 24, chapter 35, subchapters 2 and 3.

(2) The test for determining whether an individual is acting as an independent contractor for wage claim purposes is that found at ARM 24.35.301 through 24.35.303. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-201 et seq. MCA; NEW, 1996 MAR p. 1668, Eff. 7/1/96.)

24.16.7521 FILING A CLAIM (1) Wage claims may be filed whenever an employee has not received wages that are due. These wages can be, but are not limited to, vacation pay, overtime pay, or regular wages.

(2) A claim may be filed by:

(a) the employee;

(b) the estate of an employee; or

(c) an authorized representative of the commissioner, on behalf of an employee or group of employees.

(3) A claim must be reduced to writing on the form furnished by the commissioner and signed by the person making the claim.

(4) Wage claim forms can be obtained from the labor standards bureau, employment relations division, department of labor and industry, either in person, by telephone, or by mail. The street address of the Labor Standards Bureau is 1805 Prospect Ave, Helena, Montana. The mailing address is P.O. Box 1728, Helena, Montana 59624-1728. The telephone number is 406-444-5600.

(5) Field investigations commenced by the commissioner need not be on the form referenced above. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-211 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7522 and 24.16.7523 reserved

24.16.7524 EMPLOYEE'S FAILURE TO PROVIDE INFORMATION

(1) If an employee fails to provide information requested by the department within time frames specified by the department, the department may dismiss the claim. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-210 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7525 and 24.16.7526 reserved

24.16.7527 EMPLOYER RESPONSE TO CLAIM (1) A claim is commenced when a letter is mailed to the employer by an authorized representative of the commissioner notifying the employer of the claim.

(2) An employer must file a written response to a claim. The response must either be on the form provided by the department or presented in a similar format.

(3) To be timely, the employer's written response must be postmarked or delivered to the department by the date specified by the department. Upon timely request, and for good cause shown, the department may allow additional time for response.

(4) In the event the employer's response contains an allegation that the wage claimant is an independent contractor, a partner, part of a joint venture, or any other employment status other than that of employee, the employment status issue will be referred to the department's independent contractor central unit for determination pursuant to ARM 24.16.7520.

(5) Failure of the employer to timely respond to a claim will result in the entry of a determination adverse to the employer. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-209 and 39-3-210 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94; AMD, 1996 MAR p. 1668, Eff. 7/1/96.)

Rules 24.16.7528 through 24.16.7530 reserved

24.16.7531 DETERMINATION (1) Following the expiration of the time for an employer to respond to a claim, the department will make a written determination of the wages and penalty owed, if any.

(2) The written determination will incorporate by reference any determination of the department's independent contractor central unit regarding the employment status of the wage claimant.

(3) A copy of the written determination will be mailed to each party and attorneys of record at their last known address.

(4) Failure of the employer to timely respond to a claim will result in the entry of a determination adverse to the employer. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-209 and 39-3-210 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94; AMD, 1996 MAR p. 1668, Eff. 7/1/96.)

Rules 24.16.7532 and 24.16.7533 reserved

24.16.7534 REQUEST FOR REDETERMINATION (1) A party who has received an adverse decision may request a redetermination. If the party disagrees with an employment status determination, that issue should be raised in the request for redetermination. However, the redetermination will be limited to issues other than the employment status of the wage claimant. If an employment status issue is raised, it will be reserved for the formal hearing referenced in ARM 24.16.7537.

(2) The request for a redetermination must be made within 15 days of the date the determination is mailed. The request for a redetermination must be in writing and include new or additional information relevant to the issue(s) in dispute. The request must include the new information which the department is to consider.

(3) After receiving a timely request for a redetermination which includes new or additional information, the department will issue a written redetermination and mail a copy to the parties.

(4) The department will only issue one redetermination for each party who has received an adverse decision. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-209 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94; AMD, 1996 MAR p. 1668, Eff. 7/1/96.)

24.16.7535 PAYMENT OF WAGES AND PENALTIES (1) Whenever the department determines that wages and penalty, if any, are due, it will advise the employer regarding the method of payment. The department may require payment in either the department's or the claimant's name. The department may also require that payment be by money order, certified check, or other negotiable instrument. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-201 et seq. MCA; NEW, 1996 MAR p. 1668, Eff. 7/1/96.)

Rule 24.16.7536 reserved

24.16.7537 REQUEST FOR FORMAL HEARING (1) A party who has received an adverse decision from a compliance specialist may request a formal hearing within 15 days of the date either the determination or the redetermination is mailed or served upon the party.

(2) A request for a formal hearing must be in writing, mailed as specified in the adverse decision, and include the following:

(a) the name and address of the requesting party;

(b) the name and address of the opposing party; and

(c) a statement that the party desires a hearing.

(3) Upon receiving a timely, written request for a formal hearing, the department will commence contested case proceedings. Any question as to whether the request is timely will be resolved by the board of personnel appeals. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-216 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7538 through 24.16.7540 reserved

24.16.7541 DEFAULT ORDERS AND DISMISSALS (1) A default order will be issued if the employer fails to timely file a written response to the determination.

(2) The default order will specify the amount owed by the employer to the employee as wages and penalty.

(3) A dismissal will be issued if the employee fails to timely file a written response to a determination or if no merit is found to the claim.

(4) Appeals of default orders and dismissals must be made in writing within 15 days of the date the default order or dismissal was mailed or served upon the requesting party. The board is the body that hears appeals of default orders. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-216 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7542 and 24.16.7543 reserved

24.16.7544 REQUEST FOR RELIEF IF MAIL IS NOT RECEIVED

(1) A party which alleges that it did not receive timely notice by mail of the claim, determination or hearing process provided by these rules has the burden of proof of showing that the party ought to be granted relief. The party seeking relief must present clear and convincing evidence to rebut the statutory presumption contained in 26-1-602, MCA, that a letter duly directed and mailed was received in the regular course of the mail.

(2) All questions regarding alleged non-receipt of mail, or whether a request for a redetermination, request for a formal hearing, or an appeal was timely made must be resolved by the board.

(3) Once a judgment is issued by a district court concerning a decision, any request for relief must be directed to the district court by a party (not the department on behalf of a party) pursuant to the Rules of Civil Procedure and be in the form required by the district court. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-216 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7545 and 24.16.7546 reserved

24.16.7547 APPEAL OF FORMAL HEARING (1) Appeal of a formal hearing order is made to the board. A party who has received an adverse decision may request an appeal.

(2) The time period in which to make an appeal is within 15 days of the date the decision of the hearing officer is mailed. The appeal must identify where the appealing party alleges the hearing officer was in error. The appeal must be filed with the Board of Personnel Appeals, P.O. Box 1728, Helena, MT 59620. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-217 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7548 through 24.16.7550 reserved

24.16.7551 PENALTY WHEN PAYMENTS ARE MADE PRIOR TO DETERMINATIONS AND SUBSEQUENT TO DETERMINATIONS (1) In cases where the wages claimed are paid by the employer either before or after receipt of the initial letter commencing the claim ARM 24.16.7527(1) and prior to the issuance of a determination, no penalty will be imposed unless any of the special circumstances described in ARM 24.16.7556 apply.

(2) In cases where payment made either before or after receipt of the first letter does not resolve the claim and a determination is made finding that additional wages are due, a penalty will be calculated only on the balance determined still due to the employee, unless any of the special circumstances described in ARM 24.16.7556 apply.

(3) Money paid pursuant to a determination or redetermination will not be disbursed prior to the running of appeal periods unless the department is notified in writing that payment resolves the claim.

(4) Money paid pursuant to a determination but paid under protest or in other than free and clear manner will be deposited in the department trust account pending disposition. Payments made in this manner may be subject to the full penalty allowed in 39-3-206, MCA. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-206 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7552 through 24.16.7555 reserved

24.16.7556 SPECIAL CIRCUMSTANCES JUSTIFYING MAXIMUM PENALTY (1) The following conduct by the employer constitutes special circumstances that justify the imposition of the maximum penalty allowed by law:

(a) the employer fails to provide information requested by the department and/or does not cooperate in the department's investigation of the wage claim;

(b) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;

(c) the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim; or

(d) the employer has issued an insufficient funds paycheck.

(2) Exceptions may be made in instances where the employee has failed to provide records or information necessary for the employer to make final payroll calculation and issue the final paycheck.

(3) The maximum penalty is mandatory under the above circumstances and may be reduced only upon the written mutual agreement of the parties and the department. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-206 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7557 through 24.16.7560 reserved

24.16.7561 PENALTY FOR MINIMUM WAGE AND OVERTIME CLAIMS (1) For determinations involving minimum wage and overtime that are filed on or after October 1, 1993, penalties are calculated as follows:

(a) a penalty equal to 110% of the wages determined to be due to the employee will be imposed in all determinations issued by the department; but

(b) if none of the special circumstances of ARM 24.16.7556 apply the department will reduce the penalty to 55% of the wages determined to be due provided the employer pays the wages found due in the time period specified in the determination as well as a penalty equal to 55% of that amount.

(2) The penalty calculated according to this rule may be reduced only upon the mutual agreement of the parties and the department.

(3) Claims for minimum wage and overtime filed against employers covered by provisions of the Fair Labor Standards Act will be subject to the penalty provisions of that Act. (History: 39-3-202 and 39-3-403 MCA; IMP, 39-3-206 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7562 through 24.16.7565 reserved

24.16.7566 PENALTY FOR CLAIMS INVOLVING OTHER KINDS OF COMPENSATION (1) For determinations involving claims filed on or after October 1, 1993, if none of the special circumstances of ARM 24.16.7556 apply, penalties are calculated as follows:

(a) a penalty equal to 55% of the wages determined to be due to the employee will be imposed in all determinations issued by the department; but

(b) the department will reduce the penalty to 15% of the wages determined to be due if the employer pays the wages found due in the time period specified in the determination as well as a penalty equal to 15% of that amount.

(2) If a claim involves any of the special circumstances of ARM 24.16.7556, the department will impose the maximum penalty allowed by law.

(3) The penalty calculated according to this rule may be reduced only upon the mutual agreement of the parties and the department. (History: 39-3-202 MCA; IMP, 39-3-206 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Rules 24.16.7567 and 24.16.7568 reserved

24.16.7569 PENALTY FOR MIXED CLAIMS (1) Penalties for claims involving more than one type of wage claim are calculated by applying the appropriate administrative penalty rule to each component of the claim that is determined to be valid. (History: 39-3-202 MCA; IMP, 39-3-206 MCA; NEW, 1994 MAR p. 1152, Eff. 5/1/94.)

Sub-Chapters 76 through 89 reserved

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Chapter 17. Prevailing Wages For Public Works Projects

Subchapter 1 General Provisions

24.17.101 PURPOSE AND SCOPE (1) These rules are adopted pursuant to 18-2-431, MCA, giving the commissioner rulemaking authority to implement the Montana Prevailing Wage law, commonly known as Montana's "Little Davis-Bacon" Act (18-2-401, et seq., MCA). The purpose of the above referenced statutes and these rules is to protect local labor markets, to maintain the general welfare of Montana workers on public works projects, to eliminate wage cutting as a method of competing for public contracts, to maintain wages and rates paid on public works at a level sufficient to attract highly skilled laborers performing quality workmanship and to prevent the rate of wages from adversely affecting the equal opportunity of Montana contractors to bid on public works.

(2) In 1931, the legislature enacted the Montana "Little Davis-Bacon" Act. The Act requires a hiring preference for Montana workers in all contracts let for public works, a 50% preference on public works projects, excluding projects involving the expenditure of federal aid funds or where residency preference laws are specifically prohibited by federal law, and empowers the commissioner to determine the minimum wage rates to be paid to all workers on public work contracts.

Rule 24.17.102 reserved

24.17.103 DEFINITIONS As used in this subchapter, the following definitions apply, unless the context of the rule clearly indicates otherwise:

(1) "Act" means 18-2-401 through 18-2-432, MCA.

(2) "Adverse decision" means a decision by the department, or a hearing officer that is not favorable to the party who wishes to have the decision reviewed.

(3) "Apprentice" means a worker employed to learn a skilled trade under a written apprenticeship agreement registered with the department or the U.S. bureau of apprenticeship and training.

(4) "Bona fide resident of Montana" is defined at 18-2-401, MCA.

(5) "Commissioner" means the commissioner of labor and industry, as provided by 2-15-1701, MCA.

(6) "Certified payroll records" mean payroll records of an employer which show the rates and hours paid and any deductions therefrom, made by the employer on a public works contract job and which have been verified by or on behalf of the employer as being complete and accurate.

(7) "Complaint" means:

(a) a written complaint alleging non-payment of the standard prevailing wage on a public works contract job;

(b) a written request for an audit of an employer's payroll on a public works contract job; or

(c) a field investigation by the department of an employer's payroll on a public works contract job.

(8) "Day" means a calendar day.

(9) "Department" means the department of labor and industry, as provided by 2-15-1701, MCA.

(10) "Determination" means a decision by the department which states the amount of wages and penalty (if any) that may be owed for labor performed on a public works contract job.

(11) "District" means a prevailing wage district as established under 18-2-411, MCA.

(12) "Employ" has the same meaning as provided by 39-3-201, MCA.

(13) "Employee" has the same meaning as provided by 39-3-201, MCA, and includes any laborer, mechanic, skilled, unskilled and semiskilled laborer and apprentices employed by a contractor, subcontractor or employer and engaged in the performance of services directly upon or immediately adjacent to the job site. The term does not include material suppliers or their employees who do not perform services at the job site.

(14) "Employer" has the same meaning as provided by 39-3-201, MCA, and includes contractors and subcontractors.

(15) "Formal hearing" means a contested case, held by a department hearing officer, pursuant to Title 2, chapter 4, part 6, MCA.

(16) "Penalty" means the statutory penalty provided by 18-2-407, MCA, which is assessed by the department against the employer and which is paid to the employee in addition to the wages owed.

(17) "Public contracting agency" includes:

(a) the state of Montana or any political subdivision thereof;

(b) the Montana university system;

(c) any local government or political subdivision thereof;

(d) school districts, irrigation districts, or other public authorities organized under the laws of the state of Montana; or

(e) any board, council, commission, trustees or other public body acting as or on behalf of a public agency.

(18) "Prevailing wage" or "standard prevailing rate of wages" means the standard prevailing rate of wages, as provided by 18-2-401, MCA, and as adopted by the department for work on public works contracts. The standard prevailing rate of wages determined according to these rules is not a prescribed wage rate, but is rather a minimum, at or above which an individual performing labor on a public works project must be compensated.

(19) "Redetermination" means an informal review by the department, based upon new or additional information supplied by a party who has received an adverse determination.

(20) "Wages" have the same meaning as provided by 18-2-401, 18-2-412, and 39-3-201, MCA.

Rules 24.17.104 through 24.17.106 reserved

24.17.107 PREVAILING WAGE DISTRICTS ESTABLISHED

(1) Pursuant to 18-2-411, MCA, the commissioner has established 10 districts for the purpose of setting the standard prevailing rate of wages for construction services (other than heavy construction or highway construction) and non-construction services. Heavy construction and highway construction rates are set on a state-wide basis, as provided by 18-2-411, MCA.

(2) The districts are composed of the following counties:

(a) District 1: Flathead, Lake, Lincoln, and Sanders;

(b) District 2: Mineral, Missoula, and Ravalli;

(c) District 3: Beaverhead, Deer Lodge, Granite, Madison, Powell, and Silver Bow;

(d) District 4: Blaine, Cascade, Choteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole;

(e) District 5: Broadwater, Jefferson, Lewis and Clark, and Meagher;

(f) District 6: Gallatin, Park, and Sweet Grass;

(g) District 7: Fergus, Golden Valley, Judith Basin, Musselshell, Petroleum, and Wheatland;

(h) District 8: Big Horn, Carbon, Rosebud, Stillwater, Treasure, and Yellowstone;

(i) District 9: Daniels, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, and Valley;

(j) District 10: Carter, Custer, Dawson, Fallon, Prairie, Powder River, and Wibaux.

Rules 24.17.108 through 24.17.120 reserved

24.17.121 ESTABLISHING THE STANDARD PREVAILING RATE OF WAGES AND FRINGE BENEFITS (1) The commissioner shall establish the standard prevailing rate of wages and fringe benefits for the various occupations in each district. Except as used in (2) and (3), the term "prevailing rate of wages" includes both wages and fringe benefits.

(2) Based on survey data collected by the department for each district, the commissioner will compile wage rate information for a given occupation that reflects wage rates actually paid to workers engaged in public works or commercial projects. The department will survey those construction contractors who appear on a list of contractors registered pursuant to Title 39, chapter 9, MCA, as of October 22 of that year, with respect to those workers performing work according to commercial building codes. Wage rates for each occupation will be set using the following procedure:

(a) If a minimum of five or more workers is reported for the occupation within the district, and 50% or more of those workers receive the same wage, that rate is the district prevailing wage rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing wage rate cannot exceed the collectively bargained wage rate.

(b) If five or more workers are reported for the occupation within the district, but 50% of those workers are not paid the same rate, the weighted average wage rate, weighted by the number of workers, is the district prevailing wage rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing wage rate cannot exceed the collectively bargained wage rate.

(c) If less than five workers are reported for the occupation within the district, the district prevailing wage rate is the collectively bargained rate for that occupation in that district.

(d) If a collective bargaining agreement does not exist for the occupation in that district, a weighted average wage rate for the district weighted by number of workers will be computed using data submitted from all contiguous districts. Districts and their contiguous districts are as follows:

(i) District 1 (Flathead, Lincoln, Sanders, Lake counties): districts 2, 3, 4, and 5.

(ii) District 2 (Missoula, Ravalli, and Mineral counties): districts 1 and 3.

(iii) District 3 (Granite, Powell, Deer Lodge, Silver Bow, Madison, and Beaverhead counties): districts 1, 2, 5, and 6.

(iv) District 4 (Cascade, Choteau, Toole, Liberty, Glacier, Pondera, Teton, Hill, and Blaine counties): districts 1, 5, 7, and 9.

(v) District 5 (Lewis and Clark, Broadwater, Meagher, and Jefferson counties): districts 1, 3, 4, 6, and 7.

(vi) District 6 (Gallatin, Park, and Sweet Grass counties): districts 3, 5, 7, and 8.

(vii) District 7 (Wheatland, Fergus, Musselshell, Petroleum, Golden Valley, and Judith Basin counties): districts 4, 5, 6, 8, and 9.

(viii) District 8 (Stillwater, Yellowstone, Rosebud, Treasure, Big Horn, and Carbon counties): districts 6, 7, 9, and 10.

(ix) District 9 (Valley, Phillips, Sheridan, Daniels, Garfield, McCone, Richland, and Roosevelt counties): districts 4, 7, 8, and 10.

(x) District 10 (Carter, Wibaux, Dawson, Fallon, Prairie, Custer, and Powder River counties): districts 8 and 9.

(e) If contiguous district data do not sum to a minimum of five workers, a statewide weighted average wage rate will be calculated for the occupation.

(f) If a minimum of five workers is not reported for the occupation in the entire state, no rate will be established for that occupation.

(3) Based on survey data collected by the department of labor and industry, for each district, the commissioner will compile fringe benefit information for a given occupation by district that reflects fringe benefits actually paid to workers engaged in public works or commercial projects. The department will survey those construction contractors who appear on a list of contractors registered pursuant to Title 39, chapter 9, MCA, as of October 22 of that year, with respect to those workers performing work according to commercial building codes. A single fringe benefit rate for each occupation will be set for bona fide benefits paid or contributed to approved plans, funds or programs for health insurance, life insurance, pension or retirement, vacations, holidays and sick leave, using the following procedure:

(a) If a minimum of five or more workers is reported for the occupation within the district, and 50% or more of those workers receive the same dollar value of fringe benefits, that rate is the district prevailing fringe benefit rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing fringe benefit rate cannot exceed the collectively bargained rate.

(b) If five or more workers are reported for the occupation within the district, but 50% of those workers are not paid the same fringe benefit rate, the weighted average fringe benefit rate, weighted by the number of workers, is the district prevailing fringe benefit rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing fringe benefit rate cannot exceed the collectively bargained rate.

(c) If less than five workers are reported for the occupation within the district, the district prevailing fringe benefit rate is the collectively bargained fringe benefit rate for that occupation in that district.

(d) If a collective bargaining agreement does not exist for the occupation in that district, but a minimum of five workers are reported in the combined contiguous districts, a weighted average fringe benefit rate for the district, weighted by the number of workers, will be computed using data submitted from all contiguous districts. Districts and their contiguous districts are the same as provided by (2)(d) of this rule.

(e) If contiguous district fringe benefit data do not sum to a minimum of five workers, statewide weighted average fringe benefit rates will be calculated for the occupation.

(f) If a minimum of five workers are not reported for the occupation in the entire state, no fringe benefit rate will be established for that occupation.

(4) The commissioner may request clarification, additional information or independent verification of information submitted pursuant to this rule.

(5) The commissioner will annually incorporate the federal Davis-Bacon Act wage rates established for Montana as the state heavy and highway construction rates. Building construction services prevailing wage rates will be updated annually, and nonconstruction services will be updated in odd-numbered years.

(6) In the event of an incorrect prevailing wage rate being published, the commissioner will review additional data submitted to determine that the rate is incorrect. If found to be incorrect, the prevailing wage rate will revert to the last published rate that was adopted via the rulemaking and public hearing process. For temporary rates which have not been adopted via the rulemaking and the public hearing process, an amended rate will be calculated based on information collected and submitted.

(7) It is the obligation of any person having possession or knowledge of wage rate information, including collective bargaining agreements that the commissioner should consider, or it is desired that the commissioner consider, to timely deliver such information to the commissioner.

(8) Wage information may be considered by the commissioner only if such information is delivered to the Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728, within the time set by the commissioner.

(9) Within each district, the commissioner considers current wage rate information on file and sets the standard prevailing rate of wages for each craft, trade, occupation, or type of workers. Except as provided in (2), all rates shall be adopted in accordance with ARM 24.17.127.

Rules 24.17.122 and 24.17.123 reserved

24.17.124 DEPARTMENT ASSISTANCE AND NEW JOB CLASSIFICATION RATES (1) Assistance in determining the nature of public works projects and whether heavy, highway or building construction prevailing wage rates apply, can be obtained through the office of the commissioner of labor and industry. Any determination or assistance provided by the commissioner's office is based solely on the facts as presented to the commissioner in the specific request for assistance.

(2) If the commissioner receives a written request for a rate that does not exist for a particular craft, trade, or occupation, the commissioner may set an interim advisory rate that may be used by the public contracting agency or public contractor until the rate is published in accordance with ARM 24.17.127. Such rates will not be established more frequently than once every three months.

(3) At least 30 days prior to advertising for bids or letting a contract for a public works project, a public contracting agency may request that a new job classification and commensurate rate of wages and fringe benefits be established for a particular craft, classification or type of worker needed for a project. The commissioner will establish a standard prevailing rate of wages for any craft, classification or type of worker for which no rate has been previously determined.

(4) A request for a new project job classification and commensurate rate of wages and benefits does not relieve a contractor from the obligation to classify and pay workers in accordance with annually established standard prevailing wage rates pending the establishment of a new job classification and wage rates.

(5) A request for a new job classification and rate of wages shall include:

(a) identification of the project by name, number or description and location;

(b) the name and address of the public contracting agency and the successful public contractor if a contract for work on the project has been awarded;

(c) the name, address and signature of the requesting party, and the name, address and signature of a requesting party's representative;

(d) each proposed job classification and rate of wages requested;

(e) a brief description of the project and the character of the work to be performed;

(f) a detailed description of the job requirements, work to be performed and skills involved in each proposed job classification;

(g) an explanation as to why none of the classifications established for the standard prevailing rate of wages is applicable;

(h) any written items of information or documents the requesting party desires to be considered;

(i) the names and addresses of all parties entitled to notice and a signed and dated certificate showing that a copy of the request was mailed to each.

(6) A request for a new job classification and rate of wages must establish:

(a) that the project is of such an unusual character that its performance requires unique skills not traditionally performed by any craft classification or type of worker for which there has been established a standard prevailing rate of wages;

(b) that there exists a classification of workers who commonly perform work involving such unique skills at the proposed rate of wages.

Rules 24.17.125 and 24.17.126 reserved

24.17.127 ADOPTION OF STANDARD PREVAILING RATE OF WAGES (1) The commissioner's determination of minimum wage rates, including fringe benefits for health and welfare, pension contributions and travel allowance, by craft, classification or type of worker, and by character of project, are adopted in accordance with the Montana Administrative Procedure Act and rules implementing such act.

(a) A notice of proposed adoption of the commissioner's determination is published in the Montana Administrative Register 30 to 45 days prior to adoption according to regular publication dates scheduled in ARM 1.2.419.

(b) Adopted wage rates are effective until superseded and replaced by a subsequent adoption.

(c) The wage rates applicable to a particular public works project are those in effect at the time the bid specifications are advertised.

(d) The wage rates proposed and the wage rates adopted are incorporated by reference in respective notices published in the Montana Administrative Register.

(e) The current building construction services rates are contained in the 2002 version of "The State of Montana Prevailing Wage Rates - Building Construction Services" publication.

(f) The current non-construction services rates are contained in the 2001 version of "The State of Montana Prevailing Wage Rates - Service Occupations" publication.

(g) The current heavy and highway construction services rates are contained in the 2002 version of "The State of Montana Prevailing Wage Rates - Heavy and Highway Construction Services" publication.

(2) The commissioner maintains a mailing list of interested persons and agencies. A copy of any notice, proposed rate of wages, adopted rates, wages or other information are distributed to each addressee. All others may obtain a copy or be included on the mailing list upon request to the Office of Research and Analysis, Workforce Services Division, Department of Labor and Industry, 840 Helena Avenue, Helena, MT 59601. Copies of adopted wage rates are available at reproduction cost for a period of five years following their effective date.

(3) The standard prevailing rates of wages are hereby adopted and incorporated by reference. Copies of the rates are available upon request from the Office of Research and Analysis, Workforce Services Division, Department of Labor and Industry, 840 Helena Avenue, Helena, MT 59601, (406) 444-2430.

Rules 24.17.128 through 24.17.140 reserved

24.17.141 OBLIGATIONS OF PARTIES REGARDING THE PAYMENT OF PREVAILING WAGES (1) Montana law requires payment of the standard prevailing rate of wages on public works contracts. Public contracting agencies, contractors, and subcontractors and employers each have a role in complying with the prevailing wage laws.

(2) Assistance in determining the nature of public works projects and whether heavy, highway or building construction prevailing wage rates apply, can be obtained through the office of the commissioner of labor and industry. Any determination or assistance provided by the commissioner's office is based solely on the facts as presented to the commissioner in the specific request for assistance.

(3) Pursuant to 18-2-422, MCA, a public contracting agency is obligated to include in its bid specifications and public works contracts a provision that the contractors, subcontractors and employers must pay the standard prevailing rate of wages in the performance of the public works contract, and specify what those rates are. As provided in 18-2-403, MCA, the failure of the public contracting agency to include such provisions subjects the public contracting agency to liability for any underpaid wages owed by any contractor, subcontractor or employer for the performance of the public works contract.

(4) Pursuant to 18-2-403, MCA, if the public contracting agency includes the required provisions regarding payment of the standard prevailing rate of wages, the contractor, subcontractor or employer that signs the contract with the public contracting agency is obligated to ensure that the appropriate standard prevailing rate of wages is paid to each employee performing construction services in performance of the public works contract, and is liable for any underpaid wages or fringe benefits.

(5) As provided in 18-2-406, MCA, each contractor, subcontractor or employer must post the wage scale to be paid for work done in performance of the public works contract in a prominent and accessible site on the project or work area from the first day of work and continued for the duration of the project. Failure to pay at least the standard prevailing rate of wages subjects each contractor, subcontractor or employer to penalties and fees as provided by law.

(6) In order to ensure compliance with Montana's prevailing wage laws, public contracting agencies, contractors, subcontractors and employers may enter into contractual agreements that specify that each contractor, subcontractor or employer working on the public works contract has an obligation to ensure that any person, firm or entity performing any portion of the public works contract for which the contractor, subcontractor or employer is responsible, is paid the applicable standard prevailing rate of wages. The terms of the contract may include a provision for the indemnification of a party that is required to pay underpaid wages on behalf of any other person, firm or entity that failed to properly pay the required prevailing wage.

(7) The failure of a contractor, subcontractor or employer to comply with the provisions of 18-2-412, MCA, regarding the acceptable alternative methods of paying the standard prevailing rate of wages, may subject that party to penalties as provided by law and damages or obligations as specified by contract.

Rules 24.17.142 and 24.17.143 reserved

24.17.144 OBLIGATIONS OF PUBLIC CONTRACTING AGENCIES

(1) A public contracting agency must include in the bid specifications and contracts for any public works the following:

(a) An unequivocal agreement by the contractor to give preference to employment of bona fide Montana residents in compliance with 18-2-403(1), MCA. For any construction project, excluding projects involving the expenditure of federal aid funds or where residency preference laws are specifically prohibited by federal law, the bid specifications and the contract shall provide that at least 50% of the workers (including workers employed by subcontractors) will be bona fide Montana residents in compliance with 18-2-403(1) and 18-2-409, MCA. In the case of a particular contractor such percentage of Montana residents shall be modified to comply with any written directive by the commissioner specifying a different percentage.

(b) An unequivocal agreement by the contractor that a worker (including workers employed by a subcontractor) performing labor on the project will be paid the applicable standard prevailing rate of wages as determined by the commissioner.

(c) A listing of standard prevailing wage rates including fringe benefits determined by the commissioner applicable to the public works contract.

(d) The contract provisions must clearly show that the contractor and its subcontractors are bound to pay wages at rates determined by the commissioner, and to give required preferences.

(2) If a contract for public works is to be performed in more than one district where a different standard prevailing rate of wages is established for a particular craft, classification or type of worker, the highest rate is the rate to be included in the bid specifications and contract provision.

(3) Whenever a public works project is accepted by a public contracting agency, the agency shall promptly send to the department a notice of acceptance and the completion date of the project. This notice is required only if the public works project is covered by the Act.

(4) If a public contracting agency fails to comply with the requirements of this rule, the obligation to pay the standard prevailing rate of wages will be placed on the public contracting agency and the contractor may be relieved of such obligation.

Rules 24.17.145 and 24.17.146 reserved

24.17.147 OBLIGATIONS OF EMPLOYERS, CONTRACTORS AND SUBCONTRACTORS (1) All contractors and subcontractors shall give preference in hiring to bona fide Montana residents in the performance of public works contracts.

(a) In the performance of a public works contract for a construction project, a contractor, subcontractor or employer shall ensure that at least 50% of all workers performing labor under the contract for public works are bona fide Montana residents.

(b) For cause as provided in 18-2-409, MCA, a contractor, subcontractor or employer may in writing request that the commissioner modify percentage residency requirements on a particular project. In requesting the variance, the contractor, subcontractor or employer must document in writing any and all measures taken in assessing the availability of bona fide Montana employees including, but not limited to, contacting local job service offices, newspaper advertising, and contacting local union halls, temporary or personnel agencies. The commissioner may modify or waive residency requirements under the provision of the statute and shall by written directive notify the contracting agency of any such modification or waiver.

(2) All contractors, subcontractors and employers shall classify each employee who performs labor on a public works project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each such employee a rate of wages not less than the standard prevailing rate.

Rules 24.17.148 through 24.17.160 reserved

24.17.161 DIVIDING PROJECTS PROHIBITED (1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance.

(2) When making a determination of whether the public agency divided a contract to avoid compliance, the commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

(a) the physical separation of project structures;

(b) whether a single public works project includes several types of improvements or structures;

(c) the anticipated outcome of the particular improvements or structures the agency plans to fund;

(d) whether the structures or improvements are similar to one another and combine to form a single, logical entity having one overall purpose or function;

(e) whether the work on the project is performed in one time period or in several phases as components of a larger entity;

(f) whether a contractor, subcontractor or employer and their employees are the same or substantially the same throughout the particular project;

(g) the manner in which the public contracting agency and the contractors, subcontractors or employers administer and implement the project; and

(h) other relevant matters as may arise in any particular case.

(3) When the commissioner determines that a public contracting agency has divided a public works project to avoid compliance, the commissioner shall issue an order compelling compliance. The order shall be written and shall offer the public contracting agency the opportunity to contest the order.

Rules 24.17.162 through 24.17.170 reserved

24.17.171 APPRENTICES (1) Apprentices are those persons employed and individually registered in bona fide apprenticeship programs registered with or recognized by the department's bureau of apprenticeship and training or the U.S. bureau of apprenticeship and training.

(2) An employer is limited in the number of apprentices permitted on the job site for any class or type of employee based on the allowable ratio of apprentices to journeymen specified in the approved program. This requirement applies to the work site unless otherwise stated.

(3) An apprentice must register 30 days prior to the date the apprentice starts work on the project. An apprenticeship ratio is determined on a daily basis for each work week, based on the number of journeymen employed on site. Any employee who is not registered or otherwise employed as stated in this rule, shall be paid not less than the applicable wage rate on the wage determination for the class or type or work actually performed. If an employer exceeds or has exceeded the allowable ratio of apprentices to journey-level workers, the apprentice(s) who has the earliest starting date on the public works project is the apprentice who may be paid the percentage of pay specified in the apprenticeship agreement. If the records kept by the employer do not identify which apprentice started on which date, in the event the ratio is exceeded on any given day, all of the employer's apprentices working on the public works project must be paid the prevailing wage for that work week. In the event the Montana apprenticeship and training registration agency or the U.S. bureau of apprenticeship and training withdraws approval of an apprenticeship program, or deems the program to be out of compliance, the contractor, subcontractor or employer shall no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the class or type of work performed until determined in compliance or an acceptable program is approved.

Subchapter 2 Reserved

Subchapter 3 Records And Payments

24.17.301 REQUIRED RECORDS (1) All contractors, subcontractors or employers performing work on public works contracts shall make and maintain for a period of three years from the completion of work upon such public works projects, records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to employees upon public works projects.

(2) In addition to the certification required by ARM 24.17.307, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid must include, but are not limited to, records of:

(a) the name, address, and social security number of each employee;

(b) the work classification or craft of each employee;

(c) the rate or rates of monetary wages and fringe benefits paid to each employee, including:

(i) the amount of payment (if any) for travel expenses;

(ii) the amount of payment (if any) for per diem expenses;

(iii) the amount of payment (if any) for other reimbursed expenses; and

(iv) the fair market value of any other benefits provided to the employee by the employer, such as allowing personal use of a company vehicle by the employee and the value of meals and lodging directly furnished by the employer;

(d) the rate or rates of fringe benefits payments made in lieu of those required to be provided to each employee;

(e) total daily and weekly compensation paid to each employee;

(f) the daily and weekly hours worked by each employee, specified by actual calendar date; and if the employee worked in more than one craft or classification for which different rates were payable, the records shall show the number of hours in each day worked at the different crafts or classifications;

(g) apprenticeship and training agreements and standards;

(h) any deduction, rebates or refunds taken from each employee's total compensation and actual wages paid; and

(i) any payroll and other records pertaining to the employment of employees on a public works project.

(3) When apprentices are employed on a public works project, the records must clearly distinguish them from other employees. The records must also clearly identify the date each apprentice started working on the public works project and must include verification of apprenticeship registration.

(4) When a contractor, subcontractor or employer employs an employee on public works projects and non-public works projects during the same work week and the employee is paid a rate of pay which is less than the prevailing wage rate when working on a non-public works project, the employer must separately record the hours worked on the public works contract projects and those hours worked elsewhere.

Rules 24.17.302 and 24.17.303 reserved

24.17.304 RECORDS AVAILABILITY (1) Every employer (including a contractor or subcontractor) performing work on a public works project shall make available to the department records necessary to determine if the prevailing wage rate has been or is being paid to employees on the public works project. Such records shall be made available for inspection and transcription within 72 hours of an on-site inspection, within five days of a mail-in request or at such later time as may be specified by the department.

Rules 24.17.305 and 24.17.306 reserved

24.17.307 PAYROLL CERTIFICATION (1) When a prevailing wage complaint has been filed with the department or when the department has otherwise received evidence indicating that a violation has occurred, or when the department undertakes an audit, the department shall send a letter requesting copies of the contractor, subcontractor or employer's payroll records. The records requested will include those enumerated in ARM 24.17.301, and shall be forwarded to the department within five days. Included with the records must be a statement with respect to the wages paid each employee. This statement shall be executed by the contractor, subcontractor, employer or by an authorized officer or employee of the contractor, subcontractor or employer who supervises the payment of wages, and shall certify the payroll records, or copies thereof, are true and accurate and reflect all payments and deductions made for employees employed on the public works project for each week.

Rules 24.17.308 through 24.17.310 reserved

24.17.311 FULL PAYMENT REQUIRED (1) Each contractor, subcontractor or employer shall pay each employee not less than the prevailing wage rate required unconditionally, without subsequent rebate, and except as provided in (2), without deductions for:

(a) meals;

(b) lodging;

(c) transportation; or

(d) use of small tools.

(2) A contractor, subcontractor or employer may make deductions if such deductions are in a form prescribed by the commissioner and consistent with federal WH-347 payroll form available at www.dol.gov and are either:

(a) required by law;

(b) required or allowed by a collective bargaining agreement between a bona fide labor organization and the contractor, subcontractor or employer; or

(c) expressed in a written or oral agreement carried out in practice or in fact and mutually understood between an employee and an employer and undertaken at the beginning of employment. Such an agreement must concern the fair market value of other benefits provided to the employee by the employer such as meals and lodging directly furnished by the employer, employee use of company vehicles, or other similar items not regularly or customarily provided.

Rules 24.17.312 through 24.17.315 reserved

24.17.316 WAGE AVERAGING PROHIBITED (1) A contractor, subcontractor or employer may not reduce an employee's regular rate of pay for work on projects not subject to the prevailing wage rate laws when the reduction in pay has the effect of the employee not receiving the prevailing rate of wage for work performed on the public works project.

(2) As used in this rule, "regular rate" has the same meaning as that defined in ARM 24.16.2512.

(3) When making a determination of whether a contractor, subcontractor or employer has reduced an employee's regular rate in violation of (1) of this rule, the department shall consider:

(a) the timing of the wage rate reduction;

(b) whether the wage rate reduction was made pursuant to an established plan;

(c) whether the wage rate reduction is applied equally to all employees in similar job classifications;

(d) whether the wage rate reductions are applied to employees employed on public works projects, but not to employees employed only on projects not subject to the prevailing wage rate laws; and

(e) other considerations as the facts and circumstances of a particular matter may reveal.

Rules 24.17.317 through 24.17.320 reserved

24.17.321 PAYMENT OF FRINGE BENEFITS (1) All contractors, subcontractors and employers that are required to pay employees the prevailing rate of wages must pay no less than the hourly rate of pay and fringe benefits as determined by the commissioner.

(2) Apprentices must be paid the percentage of the basic hourly rate required, based on the total time in the craft, and/or fringe benefits specified in the employers' registered apprenticeship standards. If the apprentice performs labor which is subject to a higher wage rate either by contract or by law than that specified in the apprenticeship standards, the higher wage rate shall be paid by the contractor, subcontractor or employer. If the standards are silent on the payment of fringes, the apprentice is to receive the full amount of the fringe benefits stipulated on the wage decision.

(3) The provisions of this rule are met when the amount of the fringe benefit or benefits is paid to the employee, in cash, or irrevocable contributions are made to a trustee or a third party administering a fringe benefit or benefits program.

(4) When a contractor, subcontractor or employer pays an hourly rate of pay which exceeds that determined by the commissioner, the amount by which the rate is exceeded may be credited toward payment of the amount of fringe benefits determined by the commissioner for the trade or occupation.

(5) When a contractor, subcontractor or employer pays a rate for any one fringe benefit which exceeds that which is determined for the fringe benefit, the amount by which the rate is exceeded may be credited toward payment of the amount to be paid for all fringe benefits as determined by the commissioner for the trade or occupation.

(6) When a contractor, subcontractor or employer pays an amount for fringe benefits which exceeds the amount of fringe benefits established by the commissioner, the excess amount may be credited towards the hourly rate of pay. In order for the credit to apply, the contractor, subcontractor or employer must have the amount paid for fringe benefits separately identified as required by ARM 24.17.301(2).

(7) Contributions to fringe benefit plans must be made not less than quarterly.

Rules 24.17.322 through 24.17.325 reserved

24.17.326 OVERTIME WAGES COMPUTATIONS (1) Where an employee performs work in one or more classifications which provide for one or more hourly rates of pay, the employee must be paid, in addition to the straight time hourly earnings for all hours worked, a sum determined by multiplying one half the weighted average of the hourly rates by the number of hours worked in excess of 40 per week.

(2) Fringe benefits must be paid for all hours worked, including the overtime hours. When determining the hourly wage rate for overtime purposes, the amount paid for fringe benefits shall be excluded from the computations when determining the overtime rate. For example, an employee who earns $15 per hour plus $3 per hour in fringe benefits and works 42 hours in a week is entitled to $600 ($15/hr x 40 hours) + $45 ($22.50/hr x 2 hours) + $126 ($3/hr x 42 hours) = $771 for that week.

Subchapter 4 Reserved

Subchapter 5 Construction Services

24.17.501 PUBLIC WORKS CONTRACTS FOR CONSTRUCTION SERVICES SUBJECT TO PREVAILING RATES (1) Public works contracts for construction services where the total contract price is more than $25,000 are subject to standard prevailing wage requirements, and include building construction, heavy construction, and highway construction.

(2) Building construction projects generally are the constructions of sheltered enclosures with walk-in access for housing persons, machinery, equipment, or supplies. It includes all construction of such structures, incidental installation of utilities and equipment, both above and below grade level, as well as incidental grading, utilities and paving.

(a) Examples of building construction include, but are not limited to, alterations and additions to buildings, apartment buildings (5 stories and above), arenas (closed), auditoriums, automobile parking garages, banks and financial buildings, barracks, churches, city halls, civic centers, commercial buildings, court houses, detention facilities, dormitories, farm buildings, fire stations, hospitals, hotels, industrial buildings, institutional buildings, libraries, mausoleums, motels, museums, nursing and convalescent facilities, office buildings, out-patient clinics, passenger and freight terminal buildings, police stations, post offices, power plants, prefabricated buildings, remodeling buildings, renovating buildings, repairing buildings, restaurants, schools, service stations, shopping centers, stores, subway stations, theaters, warehouses, water and sewage treatment plants (buildings only), etc.

(b) Projects involving the construction, alteration, or repair of single family individual dwelling units, houses, or apartment buildings of not more than four stories in height and consisting of not more than eight living units, are not subject to the prevailing wage rates.

(3) Highway construction projects include, but are not limited to, the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, and parking areas, bridges constructed or repaired in conjunction with highway work, and other similar projects not incidental to building construction or heavy construction.

(a) Highway construction projects include, but are not limited to, alleys, base courses, bituminous treatments, bridle paths, concrete pavement, curbs, excavation and embankment (for road construction), fencing (highway), grade crossing elimination (overpasses or underpasses), guard rails on highways, highway signs, highway bridges (overpasses, underpasses, grade separation), medians, parking lots, parkways, resurfacing streets and highways, roadbeds, roadways, runways, shoulders, stabilizing courses, storm sewers incidental to road construction, street paving, surface courses, taxiways, and trails.

(4) Heavy construction projects include, but are not limited to, those projects that are not properly classified as either "building construction", or "highway construction."

(a) Heavy construction projects include, but are not limited to, antenna towers, bridges (major bridges designed for commercial navigation), breakwaters, caissons (other than building or highway), canals, channels, channel cut-offs, chemical complexes or facilities (other than buildings), cofferdams, coke ovens, dams, demolition (not incidental to construction), dikes, docks, drainage projects, dredging projects, electrification projects (outdoor), fish hatcheries, flood control projects, industrial incinerators (other than building), irrigation projects, jetties, kilns, land drainage (not incidental to other construction), land leveling (not incidental to other construction), land reclamation, levees, locks and waterways, oil refineries (other than buildings), pipe lines, ponds, pumping stations (prefabricated drop-in units-not buildings), railroad construction, reservoirs, revetments, sewage collection and disposal lines, sewers (sanitary, storm, etc.), shoreline maintenance, ski tows, storage tanks, swimming pools (outdoor), subways (other than buildings), tipples, tunnels, unsheltered piers and wharves, viaducts (other than highway), water mains, waterway construction, water supply lines (not incidental to building), water and sewage treatment plants (other than buildings) and wells.

Rules 24.17.502 through 24.17.510 reserved

24.17.511 COMMERCIAL SUPPLIER DEFINED (1) As used in this chapter, the term "commercial supplier" means a person, firm or entity that regularly furnishes goods and supplies to the public or to a particular sector or industry. The term includes both retail and wholesale operations, but does not include a person, firm or entity that limits its sales or production output from any single source or place of operation for use solely in the performance of public works contracts.

(2) As used in this rule, the term "goods and supplies" means tangible items, materials or commodities that are produced or manufactured for use or incorporation in construction projects. The term includes both items that are produced or manufactured to a standard size, grade or dimension, as well as items that are specially manufactured or produced on a "to order" or "made to measure" basis.

Rules 24.17.512 and 24.17.513 reserved

24.17.514 COMMERCIAL SUPPLIERS NOT SUBJECT TO PREVAILING WAGE LAWS

(1) A commercial supplier of goods and supplies is not subject to Montana's prevailing wage laws unless that supplier acts as a construction contractor, subcontractor or employer on the public works contract by performing on-site labor.

(2) Employees of a commercial supplier who are engaged in the performance of services directly upon the job site must be paid the applicable prevailing wage rate for the classification of work performed.

(3) For the purposes of this rule, the term "construction work" means labor that is performed after the commercial supplier delivers the goods or supplies. The fact that a commercial supplier charges for delivery (based on distance from the commercial supplier's location to the job site) does not transform the delivery into "construction work".

(a) As an example, the dumping of gravel from a belly-dump trailer, even if the dumping is done in a long row, is considered to be part of the delivery of the gravel. However, if the driver of the delivery vehicle performs "shovel work" after the load is dumped, that "shovel work" is considered to be "construction work".

(b) As another example, ready-mixed concrete is delivered by a commercial supplier from the mixer truck to a particular location on the job site. The mixer truck operator is delivering the concrete when the operator directs the flow of concrete down the delivery chute that is attached to the mixer truck, even if that flow is directed into a form that has been assembled by others in place. Further movement or manipulation of the concrete, after it leaves the end of the delivery chute, such as distributing the concrete evenly in the form with a shovel or screeding the concrete, constitutes "construction work".

(c) As another example, a commercial supplier delivers road oil to a public works contract site in a tank truck. The transfer of the road oil from the tank truck to a storage tank or into a road oiler truck is considered to be delivery within the meaning of this rule. However, if the supplier's tank truck also sprays the road oil directly on the road surface, that spraying operation is considered to be "construction work" for which the prevailing rate of wages must be paid.

(d) As another example, a commercial supplier of cabinets is not engaging in "construction work" by delivering the cabinets to a particular location or locations in a building that is being constructed pursuant to a public works contract. However, any installation work done to attach the cabinets to the building, or work performed after the cabinets are attached to the building, constitutes "construction work" within the meaning of this rule.

Rules 24.17.515 through 24.17.520 reserved

24.17.521 CLASSIFYING EMPLOYEES FOR CONSTRUCTION SERVICES

(1) All employers on public works contracts for construction services (including contractors and subcontractors) shall classify each employee who performs labor on a public works contract project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each employee a rate of wages not less than the standard prevailing rate. In instances where an employee performs duties and tasks associated with other crafts for 30 minutes or less per day, the employee would still receive the appropriate rate of wages established for the employee's primary craft classification.

Rules 24.17.522 through 24.17.525 reserved

24.17.526 PROJECTS OF A MIXED NATURE (1) Prevailing wage projects will use either the heavy, highway, or building construction prevailing wage rates. In certain cases, multiple wage schedules should be included in the bid document.

(2) A guideline referred to as the "20% test" can generally be followed to determine when the heavy, highway, or building construction prevailing wage rates should be used for construction contracts.

(a) This guideline is applied when, for example, a project is principally a contract for heavy or highway construction, but building construction is a "significant component" of the project (where the budget for building construction exceeds 20% of the total anticipated construction contract amount). The project engineer should then include both the heavy or highway construction rates and building construction rates in the bid document.

(b) The same "20% test" concept would apply to a project which is principally a contract for building construction, but also includes more than 20% of the contract price for non-building construction activity. In such cases, the contract should include both the building construction rates and heavy or highway construction prevailing wage rates in the bid document.

(c) In a project of a mixed nature where the 20% guideline applies, a contractor may pay the higher of the rates (on a craft-by-craft basis) for all work performed under the contract. However, in a project of a mixed nature, the contractor is not required to pay at a rate higher than is applicable for the craft for the type of work being performed.

(3) Only one schedule of rates (either building construction, heavy construction or highway construction) is issued if a particular type of construction activity is merely "incidental" in comparison to the overall character of the entire project. For the purpose of this rule, "incidental" means that the work in question either constitutes less than 20% of the total contract price, or the work in question costs less than $1,000,000.

Subchapter 6 Non-construction Services

Rules 24.17.601 through 24.17.613 reserved

24.17.614 "SITE OF WORK" FOR NON-CONSTRUCTION SERVICES

(1) Unlike construction services, which by their very nature are performed at a specific site of work, many non-construction services can be performed at the place of business of the public contracting agency or at the place of the contractor. The fact that non-construction services are rendered at locations away from the place of business of the governmental entity does not change the requirement that the prevailing wage must be paid under the contract.

(2) As an example, school hot lunches under a food service contract could be prepared at the kitchen of a school where the food is being served, or the food could be prepared at the caterer's own kitchen and transported to the school. Regardless of where the food is being prepared, however, the employees must be paid the prevailing wage.

Rules 24.17.615 through 24.17.620 reserved

24.17.621 CLASSIFYING EMPLOYEES FOR NON-CONSTRUCTION SERVICES

(1) All employers on public works contracts for non-construction services (including contractors and subcontractors) shall classify each employee who performs labor on a public works contract project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each such employee a rate of wages not less than the standard prevailing rate.

(2) The prohibition against dividing projects so as to avoid payment of the prevailing wages, as provided in [NEW RULE VIII], is also applicable to public works contracts involving non-construction services.

Subchapter 7 Reserved

Subchapter 8 Complaint Process

Rules 24.17.801 through 24.17.813 reserved

24.17.814 COMPUTATION OF TIME PERIODS (1) In computing any period of time prescribed or allowed by these rules or any applicable statute, the day of the act, event, or default after which the designated time period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. A half holiday is not a holiday, but is considered as a regular day.

(2) For the purpose of these rules, an item sent to the department is timely if it is either postmarked or received by the department by not later than the last day of the time period.

(3) An item which does not have a postmark is considered received as of the date it is date-stamped by the department.

Rules 24.17.815 and 24.17.816 reserved

24.17.817 FACSIMILE FILINGS (1) Any document required or allowed to be filed with the department may be filed by means of a telephonic facsimile communication device (fax).

(2) Filings with the department by facsimile are subject to the following conditions:

(a) a filing must conform with all applicable rules, except that only one copy of a document need be filed by facsimile even when multiple copies otherwise would be required;

(b) if a document is received after 5:00 p.m. mountain time, the date of filing of that document, for purposes of these rules, will be the date of the next regular work day; and

(c) the original document and any copies must be received by the department within five days of the facsimile transmittal or the filing will not be recognized as timely.

(3) The failure, malfunction, or unavailability of facsimile equipment does not excuse a party from the requirements of timely filing.

Rules 24.17.818 through 24.17.820 reserved

24.17.821 FILING COMPLAINTS (1) Complaints may be filed whenever an employee allegedly has not received the prevailing wages and/or fringe benefits due. These wages can be, but are not limited to, health and welfare, pension, vacation, overtime, or regular wages.

(2) A complaint may be filed by:

(a) the employee;

(b) the estate of an employee;

(c) an authorized representative of the commissioner, on behalf of an employee or group of employees;

(d) an authorized representative of an employee, such as a union business agent; or

(e) other persons or entities who can demonstrate that they have a direct pecuniary interest in seeing that wages are properly paid on public works contracts. Such other persons or entities include, but are not limited to, competitors of the employer that unsuccessfully bid on the public works contract.

(3) A complaint must be reduced to writing on the form furnished by the commissioner or in a format acceptable to the commissioner and signed by the complaining party.

(4) Wage complaint forms can be obtained from the Labor Standards Bureau, Employment Relations Division, Department of Labor and Industry, 1805 Prospect Avenue, P.O. Box 6518, Helena, Montana 59624-6518. The telephone number is 406-444-5600.

(a) When requested by mail or telephone, the wage complaint form is mailed to the claimant by the department with a letter of instruction. The claim complaint must be filled out in detail, signed by the claimant and notarized. The form then must be returned to the labor standards bureau.

(5) Field investigations may be commenced by the commissioner without a

complaint having been filed.

24.17.822 JURISDICTIONAL REVIEW (1) Upon receipt by the department of a complaint, the complaint is reviewed to decide jurisdictional coverage.

(a) If it appears the work is subject to federal prevailing wage laws, the complainant is advised to contact the U.S. department of labor.

(b) If it appears that state prevailing wage laws apply and not more than three years have elapsed since the alleged occurrence of improper payment, the process is continued.

(2) Information is obtained to decide if the job is exempt from prevailing wage requirements. If the job is exempt, the complainant is notified and the file is closed. If the job is not exempt, the complaint process is continued.

Rule 24.17.823 reserved

24.17.824 REQUESTING PARTY'S FAILURE TO PROVIDE INFORMATION

(1) If the party requesting the investigation fails to provide information requested by the department within time frames specified by the department, the department may dismiss the complaint.

Rules 24.17.825 and 24.17.826 reserved

24.17.827 EMPLOYER RESPONSE TO COMPLAINT (1) A complaint is commenced when a letter is mailed to the employer, contractor or subcontractor by the department notifying the employer, contractor or subcontractor of the complaint and requesting certified payroll records.

(2) A copy of the letter is sent to all parties involved in the complaint:

(a) the employee(s), if a wage complaint was filed;

(b) the prime contractor, if the complaint was filed against a subcontractor;

(c) the contracting agencies and their agent, if identified; and

(d) the architect(s) or engineer(s) who prepared the bid specifications for the contracting agency.

(3) An employer must file a written response to the complaint. The response must be on either the form provided by the department or presented in a similar format.

(4) To be timely, the employer's written response must be postmarked or delivered to the department by the date specified by the department. Upon timely request and for good cause shown, the department may allow additional time for response.

(5) Failure of the employer to timely respond to the complaint will result in the entry of a determination adverse to the employer.

Rule 24.17.828 reserved

24.17.829 DEPARTMENT REVIEW OF EMPLOYER RECORDS (1) If the employer complies and submits the requested records, they are examined to determine if a violation has occurred. The records are reviewed in accordance with ARM 24.17.301.

(2) In addition, the records are reviewed to determine if the employer has a fringe benefit fund, plan, or program and whether the fund, plan, or program meets the requirements of the Employee Retirement Income Security Act of 1974 or that such fund, plan, or program is approved by the U.S. department of labor.

(3) In addition, the records are reviewed to determine whether the employer has contributed with the trust fund or private insurance company the benefits being claimed.

(4) If an inspection of the records reveals no violation, a letter is sent to the employer advising that the records are in order, no violations have been found and the file is closed. A copy of the letter is sent to all parties involved.

(5) If an inspection of the information submitted by the employer reveals a violation, the investigation is continued.

Rule 24.17.830 reserved

24.17.831 DETERMINATION (1) Following the expiration of the period for an employer to respond to a complaint, the department will make a written determination of the wages and penalty owed, if any.

(2) A copy of the written determination will be mailed to each party involved with the complaint and attorneys of record at their last known address.

(3) A party who receives an adverse decision may request either a redetermination or a formal hearing. The request must be in writing and specify whether a redetermination or a hearing is requested.

Rules 24.17.832 and 24.17.833 reserved

24.17.834 REQUEST FOR REDETERMINATION (1) A party who has received an adverse decision may request a redetermination.

(2) The request for a redetermination must be made within 15 days of the date the determination is mailed. The request for a redetermination must be in writing and must include new or additional information relevant to the issue(s) in dispute which the department is to consider.

(3) After receiving a timely request for a redetermination which includes new or additional information, the department will issue a written redetermination and mail a copy to the parties.

(4) The department will only issue one redetermination for each party who has received an adverse decision.

(5) If a request for a redetermination is not timely received, a default order will be issued. Any question as to whether the request is

timely will be resolved upon judicial review.

Rules 24.17.835 and 24.17.836 reserved

24.17.837 REQUEST FOR FORMAL HEARING (1) A party who has received an adverse decision from a compliance specialist may request a formal hearing. The request for a formal hearing must be made within 15 days of the date either the determination or the redetermination is mailed to the party.

(2) A request must be in writing, mailed as specified in the adverse decision, and include the following:

(a) the name and address of the requesting party;

(b) the name and address of the opposing party; and

(c) a statement that the party desires a hearing.

(3) Upon receiving a timely, written request for a formal hearing, the department will commence contested case proceedings. Any question as to whether the request is timely will be resolved upon judicial review.

24.17.838 MANDATORY, NONBINDING MEDIATION (1) If a formal hearing is requested, the parties are required to fully present their cases at a mediation, prior to the formal hearing.

(2) Such mediation shall be completed within 20 days of the request for formal hearing.

(3) The mediation process is mandatory, informal, held in private without a verbatim record and is confidential in nature. All communications and evidence from the mediation are confidential.

(4) The mediator, appointed by the department, will issue a report following the mediation process recommending a solution to the dispute. The mediator's report is without judicial or administrative authority and is not binding on the parties.

(5) Nothing in this rule precludes the parties from agreeing to pursue additional voluntary nonbinding mediation in an effort to resolve the dispute.

Rules 24.17.839 and 24.17.840 reserved

24.17.841 DEFAULT ORDERS AND DISMISSALS (1) A default order will be issued if the employer, contractor, subcontractor and/or the contracting agency fails to timely file a written response to the determination.

(2) The default order will specify the amount owed by the employer, contractor, subcontractor or the contracting agency to the employee as wages and/or penalties.

(3) A dismissal will be issued if there is a finding of no merit to the complaint.

(4) Appeals of default orders and dismissals must be made in writing within 15 days of the date the default order or dismissal was mailed to the requesting party.

(5) Any question as to whether the appeal is timely will be resolved upon judicial review.

Rules 24.17.842 and 24.17.843 reserved

24.17.844 REQUEST FOR RELIEF IF MAIL IS NOT RECEIVED

(1) A party alleging that it did not receive timely notice by mail of the complaint, determination or hearing process provided by these rules has the burden of proving that the party should be granted relief. The party

seeking relief must present clear and convincing evidence to rebut the statutory presumption that a letter duly directed and mailed was received in the regular course of the mail, as provided in 26-1-602, MCA.

(2) All questions regarding alleged non-receipt of mail, or whether a request for a redetermination, a formal hearing, or an appeal was timely made must be resolved upon judicial review.

(3) Once a judgment is issued by a district court concerning a decision, any request for relief must be directed to the district court by a party (not the department on behalf of a party) pursuant to the Rules of Civil Procedure and be in the form required by the district court.

Rules 24.17.845 and 24.17.846 reserved

24.17.847 APPEAL OF FORMAL HEARING (1) A party who has received an adverse decision may request an appeal. Appeal of a formal hearing order is made to district court.

(2) The time period in which to make an appeal is within 30 days of the date the decision of the hearing officer is mailed. The appeal must specifically identify the hearing officer's alleged error.

Rules 24.17.848 through 24.17.850 reserved

24.17.851 CRITERIA TO DETERMINE PENALTY AND COST IMPOSITION

(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor, or employer found in violation of the terms of the public works contract and shall cite the circumstances the commissioner finds to be applicable:

(a) the actions of the contractor, subcontractor or employer in response to previous violations, if any, of statutes and rules;

(b) prior violations, if any, of statutes and rules;

(c) the opportunity and degree of difficulty to comply;

(d) the magnitude and seriousness of the violation, including instances of aggravated or willful violation, or gross negligence; or

(e) whether the contractor, subcontractor or employer knew or should have known of the violation.

(2) It shall be the responsibility of the contractor, subcontractor or employer to provide the commissioner with evidence of any mitigating circumstances set out in (1) of this rule.

(3) In arriving at the actual amount of the penalty and costs, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or employer for the purpose of reducing the amount of the civil penalty to be assessed.

Subchapter 9 Entities Not Eligible for Public Works Contracts

24.17.901 CONTRACT INELIGIBILITY/DEBARMENT (1) After notice and an opportunity to be heard, the commissioner, acting by and through the department, may determine that a contractor, subcontractor or employer is debarred or ineligible to receive public works contracts for a period of up to three years. A contractor, subcontractor or employer, regardless of entity form, will be determined to be ineligible if the employer aggravatedly, willfully, or with gross negligence violates the provisions of Title 18, chapter 2, MCA, including but not limited to, actions such as:

(a) failing or refusing to pay the prevailing rate of wages to employees employed on public works projects;

(b) failing to respond to inquiries from the department to supply necessary payroll information and generally failing to cooperate in the investigation of the prevailing wage investigation; or

(c) submitting falsified payroll information to the department.

(2) Before placing a contractor, subcontractor or employer on the ineligible debarment list, the commissioner shall serve a notice of intended action upon the contractor, subcontractor or employer in the same manner as service of a summons or by certified mail, return receipt requested. The notice will include:

(a) a reference to 18-2-432, MCA;

(b) a short and concise statement of the matter(s) constituting a violation of Title 18, chapter 2, MCA;

(c) a statement of the party's right to request a contested case hearing and to be represented by counsel at such hearing, provided that any such request must be received by the commissioner in writing within 20 days of service of the notice;

(d) a statement that the party's name will be published on a list of persons ineligible to receive public works contracts or subcontracts, unless the party requests a contested case hearing; and

(e) a statement that failure to make written request to the commissioner for a contested case hearing within the time specified constitutes a waiver of the right to a hearing.

(3) If a contractor, subcontractor or employer makes a timely request for a contested case hearing, a hearing will be held in accordance with the Montana Administrative Procedure Act.

(4) Upon the failure of the contractor, subcontractor or employer to request a contested case hearing within the time specified, the commissioner or the commissioner's designee shall enter an order supporting the ineligibility action.

(5) Debarment applies both to a firm and individuals. In the case of a firm, it may be applied against any or all businesses in which a firm has involvement (i.e., joint ventures), or over which it has ownership or control (i.e., subsidiaries). In the case of an individual, debarment may be applied to and enforced against any and all businesses in which the individual has any level of interest, ownership or control.

(6) If debarred by the federal government or any Montana government agency, a person may not bid on or otherwise participate in any public works project or contract in any capacity (prime contractor, subcontractor, supplier, etc.), including as a separate contractor, until after the completion of the entire debarment period, whether or not the department debars the individual. Debarment proceedings may continue even if the person ceases doing business during the proceedings.

(7) If an individual is debarred by any agency of the federal government for any period, the department may debar the individual for a period up to that set by the federal government without need for further debarment proceedings. The only evidence required in a debarment hearing in a case based on an existing debarment will be a certified copy of an order, agency letter, or other final action declaring the debarment in the other jurisdiction. Presence of a certified order does not preclude the individual from presenting evidence to dispute the proposed debarment or its length. If the individual is debarred by a branch or agency other than of the Montana or federal governments (i.e., another state, a county, etc.), or if the department may wish a debarment period exceeding that set by the other Montana agency or federal government, the department must hold debarment proceedings before increasing the debarment period.

(8) As used in this rule and ARM 24.17.906, the following definitions apply:

(a) "Aggravatedly" means circumstances that, in conjunction with an act or omission in violation of Title 18, chapter 2, MCA, serve to increase the magnitude, enormity or reprehensibleness of the offense, violation, injury or damage.

(b) "Debarment" is an action taken or decision made by an agency, other than temporary determinations of nonresponsibility or suspension, that excludes a person from bidding on or participating in public works projects and contracts.

(c) "Substantial financial interest" means:

(i) an ownership interest, whether directly or indirectly, of at least 20% of the entity; or

(ii) control over the entity, whether directly or indirectly applied, that is greater than any other single person or entity with an ownership interest.

(d) "Willfully" means that the act is done or omitted with a purpose or willingness to commit the act or make the omission. It does not require any intent to violate the law or to gain an advantage. The term has the same meaning as provided by 1-1-204, MCA.

(e) "Gross negligence" means an action involving negligence in excess of ordinary negligence.

Rules 24.17.902 through 24.17.905 reserved

24.17.906 LIST OF INELIGIBLES (1) The department will publish a list of persons and entities that are ineligible to work on public works projects. The list will specify the dates of ineligibility. The list is public information and is available upon request from the department. The department will update the list as needed.

(2) The list will contain the name of ineligible employers and the names of any firms, corporations, partnerships or associations in which the employer or its owner(s) have a substantial financial interest. Those names will remain on the list for a period of three years from the date such names were first published on the list. The three year period of ineligibility will begin when the decision of the commissioner regarding ineligibility becomes final and no further appeals can be taken.

(3) An employer who desires to be removed from the list before the expiration of three years must show good cause for such removal. Such persons may petition the commissioner at any time during the period of ineligibility. The decision whether good cause exists to remove the employer from the list before the three year period expires rests in the sound discretion of the commissioner. In reviewing such petitions to determine if good cause exists, the commissioner shall consider the following matters:

(a) the history of the petitioner in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) prior violations, if any, of statutes or rules;

(c) magnitude and seriousness of the violation; and

(d) other matters which indicate to the commissioner that the petitioner is not likely to violate these rules in the future.